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United States Supreme Court.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

THE MIDDLETOWN NATIONAL BANK,
Plaintiff-in-error,
Complainant below,

vs.

TOLEDO, ANN ARBOR AND NORTH MICHIGAN RAILWAY COMPANY, *et al.*,
Defendants-in-error,
Defendants below.

Brief for Plaintiff-in-Error.

FREDERICK C. McLAUGHLIN,
Of Counsel and Solicitor for Appellant,
26 Liberty Street,
Borough of Manhattan,
New York City.

HARVEY SCRIBNER,
Of Counsel,
Toledo, Ohio.

APPEAL PRINTING CO., 14 VESEY ST. TEL. 192 CORTLANDT.

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Defendants-in-error,
Defendants below.

BRIEF FOR PLAINTIFF-IN-ERROR.

Statement.

This case comes to this court on a certificate from the United States Circuit Court of Appeals for the Second Circuit, which reads as follows:

"This cause comes here on an appeal from a decree of the United States Circuit Court for the Southern District of New York sustaining de-

murrers to the bill of complaint and dismissing the bill. The complainant, a creditor of the railway company defendant, a corporation of the State of Ohio, having recovered a judgment in the Supreme Court of the State of New York, upon which execution was issued and returned unsatisfied, brought its bill in equity, for the benefit of itself and other creditors, against numerous stockholders of the railway company defendant resident in the district, to enforce the liability of such stockholders for debts of such company under the laws of Ohio; making such company also a party defendant. Defendants demurred and the Circuit Court sustained the demurrer.

The constitution of Ohio (1851), Art. XIII, Section 3, provides as follows:

'Dues from corporations shall be secured by such individual liability of the stockholders, and other means, as may be prescribed by law; but in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock.'

In pursuance of this provision of the constitution the legislature adopted statutory provisions with respect to the stockholders of certain corporations, which appear in the Revised Statutes of 1880, Section 3258, in the following form:

'The stockholders of a corporation which may be hereafter formed, and such stockholders as are now liable under former statutes, shall be deemed and held liable, in addition to their stock, in an amount equal to the stock by them subscribed, or otherwise acquired, to the creditors of the corpora-

tion, to secure the payment of the debts and liabilities of the corporation.'

Section 3260 of the Revised Statutes of 1880, as amended in 1894, provided as follows:

'A stockholder or creditor may enforce such liability by action jointly against all the holders or owners of stock, which action shall be for the benefit of all the creditors of the corporation, and against all persons liable as stockholders; and in such actions there shall be found and determined the amount payable by each person liable as stockholder on all the indebtedness of the corporation, in which adjudication no costs shall be taxed to nor collected of any stockholder to an amount which, together with the amount to be paid on said indebtedness, will exceed the amount of the stock on which he is liable, provided, that in any such action, the plaintiff may file in the court a sworn statement that a stockholder or stockholders or the legal representatives of a deceased stockholder have not been summoned, giving their residence if known, and that it is impracticable to secure service of summons upon such stockholders or such legal representatives of a stockholder, and remitting from the claims of the plaintiff or of other creditors consenting, so much as may be found payable by such stockholders not served with summons except those who may be insolvent or non resident of the state, and judgment shall be rendered against the stockholders who have been served with summons for the *pro rata* amount for which they would be liable if all solvent stockholders resident of the state were served with summons; and when a creditor has prosecuted against a corporation an action of (at) law begun

before any action to enforce the stockholders' liability, and has recovered final judgment only after such an action to enforce the stockholders' liability has been prosecuted to a final decree in the court in which the action was commenced, such judgment creditor may bring a like action against the stockholders of the corporation to enforce such judgment at any time within four years after the recovery of his said judgment, but the stockholders shall not be liable for any amount in excess of that provided in Section 3258.'

As so amended this section stood at the time when this suit was begun. Afterwards, in 1900, but before the filing of the second amended bill of complaint, the section as further amended and supplemented, provided as follows:

'Section 3260. Whenever any creditor of a corporation seeks to charge the directors, trustees or other superintending officers of a corporation, or the stockholders thereof, on account of any liability created by law, he may file his complaint for that purpose in any common pleas court which possesses jurisdiction to enforce such liability.

SECTION 3260 (*a*). The court shall proceed thereon, as in other cases, and, when necessary, shall cause an account to be taken of the property and obligations due to and from such corporation, and may appoint one or more receivers.

SECTION 3260 (*b*). If, on the coming in of the answer or upon the taking of such account, it appears that such corporation is insolvent, and has not sufficient property or effects to satisfy such creditor, the court may proceed to ascertain the re-

spective liabilities of the directors, officers and stockholders, and enforce the same by its judgment, as in other cases.

SECTION 3260 (*c*). In all cases in which the directors or other officers of a corporation, or the stockholders thereof, are made parties to an action in which a judgment is rendered, if the property of such corporation is insufficient to discharge its debts, the court shall give notice to non-resident stockholders, as provided in Sections 5048, 5049, 5050, 5051, or 5052 of the Revised Statutes and shall first proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the company.

SECTION 3260 (*d*). If the debts of the company remain unsatisfied the court shall proceed to ascertain the respective liabilities of the directors or other officers and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment as in other cases. The court may authorize and direct the receiver to prosecute such action in his own name as receiver, as may be necessary, in other jurisdictions to collect the amount found due from any officer or stockholder.

SECTION 3260 (*e*). Whenever any action is brought against any corporation, its directors or other superintending officers, or stockholders, according to the provisions of this chapter, the court, whenever it appears necessary or proper, may order notice to be published in such manner as it shall direct, requiring all creditors of such corporation to exhibit their claims and become parties to the action, within a reasonable time, not less

than six months from the first publication of such order, and, in default thereof, to be precluded from all benefit of the judgment which shall be rendered in such action, and from any distribution which shall be made under such judgment.

SECTION 3260 (*f*). Upon a final judgment in any such action against an insolvent corporation, the court shall cause a just and fair distribution of the property and assets of such corporation or the proceeds thereof to be made among its creditors.

SECTION II. That said Section 3260 be, and hereby is, repealed.

SECTION III. This act shall apply to pending actions and shall take effect and be in force from and after its passage.

The court below sustained the demurrer on the following ground:

'It is thought that the question raised by this demurrer should be decided upon the assumption that the action is the one provided for by Sec. 3260, R. S. Ohio, as it stood after the amendment of 1894. Inasmuch as that section expressly provides for an action jointly against all the stock holders, including such as are out of the jurisdiction or for other causes cannot be served, and the complaint avers that there are stockholders who have not been made parties, there is a lack of parties defendant and the demurrer is sustained. If, moreover, the amendments of the statute passed in 1900 are to be considered, the position of the demurrants is even stronger. Manifestly this action is not the one thereby provided for.'

Questions Certified.

This court has been unable to reach a conclusion whether upon the foregoing facts the bill should have been dismissed. The questions of law concerning which this court desires the instruction of the Supreme Court for its proper decision, are:

First. Whether Article XIII, Section 3 of the Constitution of Ohio is so far self-executing that it may be enforced outside of the jurisdiction of said State without compliance with said requirements of Section 3260 of the Revised Statutes of said State as amended in 1894.

Second. Whether Article XIII, Section 3 of the Constitution of Ohio is so far self-executing that it may be enforced outside of the jurisdiction of said State without compliance with said requirements of Section 3260 of the Revised Statutes of said State as amended in 1900.

W. K. TOWNSEND,
Circuit Judge.
ALFRED C. COXE,
Circuit Judge."

Specification of Errors Relied Upon.

I. That the said Circuit Court of the United States for the Southern District of New York erred in sustaining the demurrer interposed by defendants and defendants-in-error to the second amended bill filed in said cause and by holding that said second amended bill was defective and that there was defect of parties defendants.

II. That the said court erred in rendering its decree in said cause upon the pleadings in said cause dismissing the bill of complaint, and that said decree is contrary to law and the facts as stated in the pleadings in said cause.

III. That the said court erred in not overruling the demurrers of defendants and defendants-in-error, and each of them, to the second amended bill of complaint herein.

Argument.

I. Article XIII, Section 3, of the Ohio Constitution is self executing to the extent of declaring a general contractual obligation and a general rule as to property rights.

Whitman vs. Oxford Nat. Bank, 176 U. S., 559.
Willis vs. Mabon, 48 Minn., 140.
Ohio vs. Sherman, 22 Ohio St., 411.
Brown vs. Hitchcock, 36 Ohio St., 667.
Kirtley vs. Holmes, 107 Fed. Rep., 1.
Harpold vs. Stobart, 46 Ohio St., 397.

(*a*) Section 3260 of the Revised Statutes of Ohio as originally enacted and as amended

in 1894, was declaratory merely of rules of *Chancery practice long* previously followed by Ohio courts.

Umsted vs. Buskirk, 17 Ohio St., 113.
Smith vs. Newark, etc., R. R. Co., 8 Ohio C. C. Rep., 583.

(*b*) The remedy, therefore, is nothing more than the appropriate remedy in equity for the enforcement of a proportionate, collateral liability and such remedy, from its very origin and nature, is transitory.

Kirtley vs. Holmes, 107 Fed. Rep., 1, 5.

II. This general, contractual obligation is enforceable in any United States Circuit Court having jurisdiction of the parties indispensible to a decree.

(*a*) United States Constitution, Art. III, Sections 1 and 2, establishes the right to have it enforced where diverse citizenship exists.

Smith vs. R. R. Co., 99 U. S., 398, 401.
Reynolds vs. Bank, 112 U. S., 405, 410.
Railway Co. vs. Whitton, 13 Wall., 270, 286.
Suydam vs. Broadnax, 14 Peters, 67.
See also, Smith vs. Reeves, 178 U. S., 442, 443, 444; for other cases;
Also Foster's Fed. Practice, 3d Ed., §§ 6, 7.

(*b*) The statutory origin of the obligation is immaterial.

Dennick vs. Railroad Co., 103 U. S., 11.
Whitman vs. Oxford Nat. Bank, *supra.*

(c) The United States Circuit Court can and will enforce it.

American File Co. vs. Garrett, 110 U. S., 288, 292, was a case where a similar liability in equity seems to have been enforced, although the question was not raised. U. S. Circuit Courts have full equitable jurisdiction, unimpaired by State legislation or local policy or prejudice, which is uniform throughout the Union.

Smith vs. R. R. Co., *supra*.

The Federal Courts in New York take judicial notice of Ohio law, and were created by Congress not for the purpose of administering the local law of a single State alone, but to administer the laws of all the States in the Union. Ohio statutes and laws are *law*, not *fact*, in the United States Circuit Court for the Southern District of New York.

Owings v. Hull, 9 Peters, 607, 624.

Hanley v. Donoghue, 116 U. S., 1, 6, and cases cited.

The federal courts will frequently enforce an obligation that the courts of a State in which it is sitting do not enforce.

Barrow Steamship Co. v. Kane, 170 U. S., 100.

Considerations which have influenced certain State courts in refusing to enforce this liability have no weight in a federal court, where jurisdiction is based upon diverse citizenship.

Hale v. Harden, 95 Fed. Rep., 747, 751.

Compare State Nat. Bank v. Sayward, 91 Fed. Rep., 443, with Erickson v. Nesmith, 15 Gray, 221; New Haven Horse Nail Co. v. Linden, 142 Mass., 349, and Post & Co. v. R. R. Co., 144 Mass., 341.

III. Complainant seeks to enforce this liability precisely as it is enforced in Ohio.

Fourth Nat. Bank v. Francklyn, 120 U. S., 747, 758.

Pollard v. Bailey, 20 Wall, 520.

Slater v. Mexican National R. R., 194 U. S., 210.

Davis v. Mills, 194 U. S., 451, 454.

Harpold v. Stobart, 46 Ohio St., 397.

An Ohio corporation may be found and sued in the Circuit Court of the United States for the Southern District of New York.

St. Louis Railway vs. McBride, 141 U. S., 127.

Central Trust Co. vs. McGeorge, 151 U. S., 129.

Interior Construction Co. vs. Gibney, 160 U. S., 217, 219.

In re Keasbey & Mattison Co., 160 U. S., 221, 229.

N. E. Mutual Life Ins. Co. vs. Woodworth, 111 U. S., 138, 146, and cases cited.

Barrow Steamship Co. vs. Kane, 170 U. S., 100.

Upon the certificate in this case the corporation is joined and served and before the court.

This fact of joinder and service of the corporation distinguishes this case from every other in the books where federal courts have refused to enforce this liability extraterritorially.

All parties indispensable to a decree are before the court and all limitations and conditions upon the right are complied with.

No large question of judicial policy is involved.

IV. The power of the Ohio Legislature over the liability declared by the Constitution is limited to a reasonable control of an adequate remedy for its enforcement in Ohio courts.

V. The decision of the court below resulted from an erroneous legal presumption based upon the false premise that the Legislature created and controlled the right.

Whitman vs. Oxford Nat. Bank, 28 C. C. A. Rep., 404.

VI. The said requirements of Section 3260 of the Revised Statutes of Ohio, either as amended in 1894 or as amended in 1900, do not govern in a court of another jurisdiction unless they limit and qualify the right declared by the Ohio Constitution.

(*a*) The *lex loci contractus* governs as to the substance or obligation of a contract, while the *lex fori* governs the form of action or procedure.

Kent's Commentaries, Fourteenth Ed., pp. 461–462, and cases cited. Also article by

Mr. Raleigh C. Minor in Harvard Law Review, Volume XVI, page 262, collecting and reviewing numerous authorities.

(*b*) This is true whether the origin of the liability be in the statute or the common law and whether the remedy be statutory or otherwise.

Dennick v. R. R., *supra.*
Davis v. Mills, *supra.*
Blair v. Newbegin, 65 Ohio St., 425.

VII. The said requirements of Section 3260 of the Revised Statutes of Ohio, as amended in 1894, do not limit or qualify the substantive right declared by the Constitution.

They relate to form, not to substance.

VIII. Section 3260 of the Revised Statutes of Ohio, as amended in 1900, is not literally the exclusive remedy for the enforcement of stockholders' liability under Ohio law which had accrued prior thereto.

It is wholly inadequate against non-resident stockholders.
Hale v. Allinson, 188 U. S., 56.
It therefore violates the Constitution of the United States.
Hawthorn v. Calef, 2 Wall., 10.
It is an arbitrary and unreasonable exercise of legislative control over remedy.
Davis v. Mills, 194 U. S. 451, 456, 457.
It violates Article XIII, Section 3, of the Ohio Constitution.
It violates Article 3, Section 2, of the Constitution of the United States.

Insurance Co. v. Morse, 20 Wall., 445.
Barron v. Burnside, 121 U. S., 186.
It cannot be the exclusive remedy against non-resident stockholders because it is no remedy against them at all.

IX. Both questions certified should be answered in the affirmative.

Every condition and limitation imposed upon the substantive right has been complied with and there is no defect of parties defendant in equity.

Shields v. Barrow, 17 How., 139.
Ribon v. R. R. Co., 16 Wall., 446.
Cameron v. McRoberts, 3 Wheat., 591.
United States Supreme Court Rules of Practice in Equity, 22, 47, 48.

The Ohio Legislature neither created this liability nor prescribed the remedy for its enforcement.

FIRST POINT.

Article XIII, Section 3, of the Ohio constitution is self-executing to the extent of declaring a general contractual obligation and a general rule as to property rights.

Article XIII, Section 3, of the Ohio constitution reads:

"Dues from corporations shall be secured by such individual liability of the stockholders, and other means, as may be prescribed by law; but in all cases each stockholder shall be liable, over and above the stock by him or her owned, and

any amount unpaid thereon, to a further sum, at least equal in amount to such stock."

In Whitman vs. Oxford National Bank, 176 U. S., 559, this court, speaking of a similar provision in the Kansas constitution, said:

"By Section 1 of Article 12 of the Constitution of Kansas, a certain definite liability is cast upon each stockholder in other than railway, religious and charitable corporations. * * * The words 'shall be secured' are not merely directory to the Legislature to make provision for such liability, but of themselves declare it. To this extent the Constitution is self-executing (Willis vs. Mabon, 48 Minn., 140). The discretion of the Legislature extends beyond this, as indicated by the clause 'and such other means as shall be provided by law.' A failure of the Legislature to create courts or prescribe modes of procedure may, it is true, make ineffective this constitutional provision, but it does not destroy the liability; nor is it created by the act of the Legislature prescribing the mode of its enforcement. That is the obvious meaning of the constitutional provision. 'The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption (LAMAR, Justice, in Lake County v. Rollins, 130 U. S., 662, 671).'"

In Willis v. Mabon, *supra*, Mr. Justice MITCHELL said:

"A constitution is but a higher form of statutory law, and it is entirely competent for the people, if they so desire, to incorporate into it self executing enactments. These are much more common than formerly, the object being to put it beyond the

power of the Legislature to render them nugatory by refusing to enact legislation to carry them into effect. Prohibitory provisions in a constitution are usually self executing to the extent that anything done in violation of them is void. But instances of affirmative self-executing provisions are numerous in almost every modern constitution. For instances of this see

State v. Weston, 4 Neb., 216.
Thomas v. Owens, 4 Md., 189.
Reynolds v. Taylor, 43 Ala., 420.
Miller v. Marx, 55 Ala., 322.
People v. Hoge, 55 Cal., 612."

Again, speaking of the provision in the Minnesota constitution, relating to stockholders' liability, at p. 152:

"It is in the form of a present complete enactment, which, though elliptical in form, definitely fixes the nature and amount of the liability and to whom the liability is incurred."

The question whether this provision of the Ohio constitution would be wholly self-executing so as to create a liability in the absence of legislative enactment does not arise. The Ohio Legislature in granting corporate charters has always provided for the stockholders' liability declared by the constitutional provision and has never attempted to ignore the express mandate of the people. In the early case of Ohio v. Sherman, 22 Ohio St., 411, at page 430, the Supreme Court of Ohio said:

"In the absence of any such provision in the act of incorporation, I presume this provision of the

constitution would enter into and form part of the act of incorporation, and to that extent execute itself. In either case, however, the act of incorporation, the grant of the charter, must be in some such form as will secure this liability. It must require of the *individuals* availing themselves of its provisions, some acts *as such*, under and in pursuance of it, as will subject them individually to its provisions, or to this provision of the constitution in regard to liability. If it fails to do this it is unconstitutional and void."

It seems that this provision of the constitution is an affirmative self executing declaration by the people that all stockholders of Ohio corporations shall be individually liable for corporate debts to the creditors of the corporation. It contains an implied inhibition that the Legislature shall not create corporations in which the stockholders are not so liable. As a result we find in all the early corporation charters and laws, later in Section 3258 of the Revised Statutes (Cert, fol. 2) obedience to the constitutional mandate in the form of legislative enactment adopting the minimum liability.

The enactment of Section 3258 of the Revised Statutes of Ohio and of similar provisions in the earlier laws of that State, was the condition precedent to the power of the Legislature to create corporations.

Ohio vs. Sherman, *supra.*

The contractual nature of this liability is also beyond question. In Brown vs. Hitchcock, 36 Ohio St., 667, the Supreme Court of Ohio quoted

with approval the language of the opinion in an earlier case as follows:

"It is a liability which every stockholder must be understood to assume and take upon himself and to be under to those who deal with the company. Dealers contract with the corporation on the faith of that security for the performance of the contract. The credit they give is given, and they trust, as well to the personal liability of the stockholders as to the responsibility of the corporation, for the fulfilment of the engagement; and each stockholder incurs that liability to the creditor the moment the contract of such creditor with the company is consummated. * * * It is virtually and in effect a liability upon a contract, and the mutual agreement of the parties; not indeed in form an express personal contract, but an agreement of equally binding obligation, consequent upon and resulting from the acts and admissions or implied assent of the parties."

In Whitman vs. Oxford National Bank, 176 U. S., 559, 563, this court, speaking of the liability, declared by the almost identical provision of the Kansas Constitution, said:

"The liability which by the constitution and statutes is thus declared to rest upon the stockholder, though statutory in its origin, is contractual in its nature. It would not be doubted that if the stockholders in this corporation had formed a partnership, the obligations of each partner to the others and to creditors would be contractual and determined by the general common law in respect to partnerships. If Kansas had provided for partnerships, with limited liability, and these parties, complying with the provisions of the stat-

ute, had formed such a partnership, it would also be true that their obligations to one another and to creditors would be contractual, although only in the statute was to be found the authority for the creation of such obligations. And it is none the less so when these same stockholders organized a corporation under a law of Kansas, which prescribed the nature of the obligations which each thereby assumed to the others and to the creditors. While the statute of Kansas permitted the forming of the corporation under certain conditions, the action of these parties was purely voluntary. In other words, they entered into a contract authorized by statute."

In Kirtley vs. Holmes, 107 Fed. Rep., 1, 5. 7, Mr. Justice DAY, speaking for the United States Circuit Court of Appeals for the Sixth Circuit, said:

"Before the passage of Section 3260 the Supreme Court of Ohio, passing upon the constitution and a statute enacted in practically the terms of the Constitution, without providing the method of enforcing the liability more specifically, held that the stockholders' liability created by the constitution and laws of Ohio is not a primary resource or fund for the payment of the debts of the corporation, but is collateral and conditional to the principal obligation which rests on the corporation, and is to be resorted to by the creditors only in case of the insolvency of the corporation, or where payment cannot be enforced against it by ordinary process; that an action to enforce such liability must be brought for the benefit of all the creditors against all the stockholders; that no creditor can acquire priority by undertaking to institute a separate suit for his own benefit; that the provision

inured to the benefit of all the creditors and the remedy must be sought for the common benefit of all (Wright vs. McCormack, 17 Ohio St., 87; Umsted vs. Buskirk, 17 Ohio St., 114). The right of action arising under the Constitution of the State of Ohio and the statutes passed in pursuance thereof, *while it may be regarded in some sense as a statutory action, does not wholly arise therefrom, but rather from the constitutional provision* for the benefit of creditors of corporations, declaring that stockholders shall be liable at least in an amount equal to the stock held by them. *This right, created by the constitution, could be enforced in the absence of a statute.* It is a right arising from the contract which every stockholder makes upon becoming such with the creditors of the corporation. Under such a constitution and laws passed in pursuance thereof creditors have a right to look not only to the liability of the corporation, but to the personal liability of the stockholders, which is incurred, no less than the corporate obligation, whenever any debt is created. It is, in fact, a liability upon contract. This was distinctly ruled in Brown v. Hitchcock, 36 Ohio St., 667. The Supreme Court of the United States has taken the same view of the nature of the liability under such constitutions and statutes. (Whitman v. Bank, 176 U. S., 559; 20 Sup. Ct., 477; 44 L. Ed. 587.) * * * Of course, the Ohio courts have power to enforce the assessment only upon such stockholders as are brought within their jurisdiction. It would be futile to undertake to collect an assessment upon those beyond the jurisdiction. They, therefore, enforce the contractual obligation of the stockholders to the extent which

is practicable, having in view the liability of those within the jurisdiction of the court. *The Ohio statute has not, however, undertaken to absolve other stockholders from their contractual obligation.* That still exists. It is the right of the creditor. In consideration of the liability of the stockholder, foreign as well as domestic, credit was extended to the corporation. Upon every principle of equity and justice this liability should be enforced, if it can be without violating the principles of law or unjustly discriminating against citizens of another jurisdiction."

This general contract liability declared by the Constitution, unaided and unaffected by legislative enactment, was the liability construed and enforced by the Ohio courts in all the early cases. For twenty-five years no statute pertaining to the remedy in Ohio courts was enacted (Mason vs. Alexander, 44 Ohio St., 318, 334).

The liability as thus construed and enforced by Ohio courts, without the aid of the Ohio legislature, is stated fully in Harpold vs. Stobart, 46 Ohio St., 397, as follows:

"This right against the stockholders is intended for the common and equal benefit of all the creditors. As between the stockholders and creditors, each stockholder is liable severally to all the creditors; but, as between the stockholders, there is a proportional liability by all stockholders and a right of contribution which grows out of the organic relation existing between them, and as between them, each stockholder is bound to pay in proportion to his stock. The liability is not a primary fund or resource for the payment of the debts of the company, but is collateral to the principal obligation which rests on the corpo-

ration, and is to be resorted to only in case of the insolvency of the corporation, or where payment cannot be enforced by ordinary process. (Wright vs. McCormack, 17 Ohio St., 86; Umsted vs. Buskirk, *id.*, 113; Brown vs. Hitchcock, 36 Ohio St., 667; Wheeler vs. Faurot, 37 Ohio St., 26; Bullock vs. Kilgour, 39 Ohio St., 543; Mason vs Alexander, 44 Ohio St., 318.)

Of the foregoing there should be emphasized three important conclusions bearing upon the question under consideration, viz :

(1) The liability of the stockholder is collateral to that of the corporation. (2) This liability attaches at the time the debt against the corporation is created or liability is incurred. And (3) each stockholder sought to be so made liable, has, in order that his liability may be confined to his just proportion, the right to insist that all stockholders *within the jurisdiction and solvent*, who stand in the same relation to the debts with himself, shall be brought in and be held to their proportional liability in common with him."

Section 3260 of the Revised Statutes was first enacted some time subsequent to 1876, before which time no remedy was found in the Ohio statutes (Mason vs. Alexander, 44 Ohio St., 318, 334).

The proviso to the statute was added by the amendment of 1894.

Both the statute as originally enacted, and the proviso added in 1894, were purely declaratory of existing law. That is, they declared a remedy which had long previously been worked out by the equity courts of Ohio (Umsted vs. Buskirk, 17 Ohio St., 113; Smith vs. Newark, Somerset &

Straitsville R. R. Co., 8 Ohio Circ. Ct. Rep., 583). The remedy created and declared by Ohio law, as it existed when this suit was commenced, was not a statutory remedy but the appropriate remedy for the enforcement of a proportionate collateral liability, as construed and developed by the Ohio courts long before the Legislature embodied it in statutory form. This remedy was worked out under the ordinary rules and practice of equity courts (see cases collected in Harpold vs. Stobart, *supra*). In the light of its history it would seem clear, as a matter of statutory construction, that the requirements of the remedy are to be construed as nothing more than the well established rules of chancery practice relating to joinder of parties defendant.

Wherever, as in Umsted vs. Buskirk, *supra*, and Harpold vs. Stobart, *supra*, the right of contribution among stockholders is stated, it is always coupled with the statement that the liability of stockholders is several. The non-joinder of one or more of numerous parties who are *severally* liable by reason of absence from the jurisdiction, will never defeat the right of recovery against the defendants who are joined (Supreme Court Rules of Practice in Equity, 22, 47, 48). It is manifest that under the rules of chancery practice stockholders not within the jurisdiction are not indispensable in an action to enforce this liability.

Shields v. Barrow, 17 How., 139.
Ribon v. Railroad, 16 Wall., 446.
Cameron v. M'Roberts, 3 Wheat., 591.
See also Foster's Federal Practice, 3d Edition, §50.

In further support of this contention we point

to the fact that there is no case in the Ohio reports where an action to enforce this liability has ever been dismissed by reason of the non-joinder of stockholders as parties defendant. There are cases where the Ohio courts have refused to dismiss the complaint because of the failure of plaintiff to join solvent stockholders resident within the jurisdiction.

> Smith v. Newark, Somerset & Straitsville R. R. Co., 8 Ohio Circuit Ct. Rep., 583.
>
> Mason v. Alexander, 44 Ohio St., 319.

In view of the ground for the dismissal of our bill given by the court below (Cert., fol. 5), the Ohio cases last cited are much in point. The fact that the statute as amended in 1894 (Cert., fols. 2–3) expressly provides for an action against resident, solvent stockholders within reach of process of the forum where the corporation is found would seem to show beyond a doubt that the learned court based its decision upon a mistaken view of the Ohio law.

Whether the remedy for the enforcement of this liability is statutory or otherwise is to our mind quite immaterial. The remedy at the time this action was commenced was nothing more than the *appropriate* remedy for the enforcement of a proportionate, collateral liability. It was worked out in its entirety by the equity courts of Ohio in the early cases of Wright v. McCormack, 17 Ohio St., 87, and Umsted v. Buskirk, 17 Ohio St., 114, and continued unchanged, before and after the enactment of the statute, down to the time this action was commenced.

Article XIII, Section 3, of the Ohio constitution

was addressed to the courts. The Ohio courts of equity were called upon to construe this constitutional provision, and in so doing spelled out a remedy for its enforcement. The remedy or cause of action which, under the decisions of the Ohio courts, was thus declared by the Ohio constitution at the time it declared the general contractual liability was not local but transitory, for the reason that the people of Ohio in adopting their constitution coupled the right created with no conditions or limitations whatsoever as to the manner of its enforcement, but left the remedy or cause of action wholly in the discretion of the courts. A remedy or cause of action worked out by the equity courts of Ohio according to the universal rules of chancery practice and procedure is surely enforceable on the equity side of the Circuit Court of the United States for the Southern District of New York upon joinder of all parties indispensable to a decree.

The liability of the stockholders of this Ohio corporation attached in favor of the creditors at the time the debt was contracted or the liability incurred by the corporation.

> Brown v. Hitchcock, 36 Ohio St., 667, 678.

It was a contract obligation that could not be impaired by subsequent legislation.

> Hawthorn v. Calef, 2 Wall., 10.

A careful examination of the Ohio law will show beyond a doubt that at the time this debt was contracted, and also at the time this suit was commenced, a general contract obligation on the part of stockholders for corporate debts, which involved

a general rule as to personal rights and property within that State, had existed and continued unchanged for half a century as part of the organic law of that State. The people had declared it; the courts had construed and enforced it; the legislature of necessity had obeyed it.

The complainant herein has come into the equity side of the Federal Court of the district in which he has been able to locate and serve the corporation, and joining with that corporation as defendants all of the numerous stockholders which he finds in the district, seeks an enforcement of this contract obligation for the benefit of himself and all the other creditors, precisely as it is enforced in the courts of Ohio.

The bill has been dismissed for non-compliance with an alleged requirement of the Ohio statute as to remedy in Ohio courts, which clearly and unquestionably does not exist (Cert., fol. 5). The United States Circuit Court of Appeals for the Second Circuit has certified the questions whether the Constitutional provision is so far self-executing that the liability can be enforced extraterritorially without compliance with "said requirements" of the statute of 1894, or of the later statute as amended in 1900 (Cert., fols. 5-6).

We are not clear as to what is meant by "said requirements" but we respectfully insist and will argue that this liability can be enforced by courts of another jurisdiction without compliance with any special requirement of either of said statutes. Both of said statutes relate solely to the form and manner of procedure in local courts and neither contains any new limitation or condition imposed upon the substantive right declared by the constitution, as construed and enforced by the Ohio courts for many years prior to the statutory enactment.

SECOND POINT.

This general contractual obligation is enforceable in any United States Circuit Court having jurisdiction of the parties indispensable to a decree.

Article III, Section 1, of the Constitution of the United States declares that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the congress may, from time to time, ordain and establish.

Article III, Section 2, of the Constitution of the United States declares that the judicial power shall extend to all cases in law and equity arising under this constitution * * * to controversies between two or more states; * * * between citizens of different states, etc.

The complainant, a citizen of Connecticut, brought its bill in equity in behalf of all the creditors, and pursuant to the requirements of the Ohio law, against this Ohio corporation and these numerous stockholders, residents of New York, in the Circuit Court of the United States for the district where the corporation and said stockholders were found, to enforce this general contract liability for the corporate debts, alleging jurisdiction by reason of diverse citizenship.

In *Smith vs. Railroad Co*, 99 U. S., 398, 401, this court said:

"The Circuit Court of the United States of that district has, nevertheless, full equity jurisdiction. The Federal courts have it to the same extent in all the states, and state legislation cannot affect

it. (Boyle vs. Zacherie, 6 Pet., 648.) The States, however, may create equitable rights, which those courts will enforce when there is jurisdiction of the parties and of the subject matter. (Clark vs. Smith, 13 *id.*, 195; *Ex parte* McNeil, 13 Wall, 236.)"

Again in *Reynolds vs. Crawfordsville Bank*, 112 U. S., 405, 410, this court said:

"It may be conceded that the legislature of a state cannot directly enlarge the equitable jurisdiction of the Circuit Courts of the United States. Nevertheless, an enlargement of equitable rights may be administered by the Circuit Courts as well as by the courts of the States. (Broderick's Will, 21 Wall., 503, 520). And although a state law cannot give jurisdiction to any federal court, yet it may give a substantial right of such a character that when there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, admiralty or common law. (*Ex parte* McNeil, 13 Wall., 236, 243.)"

In Railway Company v. Whitton, 13 Wall, 270, 286, this court speaking of a right of action which existed only by virtue of a State statute said:

"In all cases, where a general right is thus conferred, it can be enforced in any Federal court within the State having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such Federal court by any provision of State legislation that it shall only be enforced in a State court. * * * Whenever a general rule as to property or personal rights, or injuries to either, is

established by State legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case is not subject to State limitation."

The last case also contains a quotation from Suydam v. Broadnax, 14 Peters, 67, as follows:

"The 11th section of the act to establish the judicial courts of the United States carries out the constitutional right of a citizen of one State to sue a citizen of another State in a Circuit Court of the United States, and gives to the Circuit Court 'original cognizance concurrent with the courts of the several States of all suits of a civil nature at common law and in equity,' &c., &c. It was certainly intended to give to suitors, having a right to sue in the Circuit Court, remedies co-extensive with these rights. These remedies would not be so if any proceedings under an act of a State legislature, to which a plaintiff was not a party, exempting a person of such State from suit, could be pleaded to abate a suit in the Circuit Court."

See also Smith vs. Reeves, 178 U. S., 442, 443, 444 for other cases.

Also, Foster's Fed. Practice, 3d Ed., §§ 6, 7.

In Dennick vs. Railroad, 103 U. S., 11, a statute of New Jersey gave a right of action to the representatives or next of kin of a deceased person for negligence causing his death, and an action was brought under this statute in the United States Circuit Court for the Northern District of New York, by an administrator appointed in New

York. It was held that the action would lie and the liability would be enforced. The court said:

"It is indeed a right dependent solely on the statute of the state; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here.

It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common law right.

Whenever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."

The case of *Whitman v. Oxford National Bank*, 176 U. S., 559, settled this question in Federal courts. This court there re-affirmed the rule that every general contract obligation is enforceable in the Circuit Courts of the United States because it is contractual, and put an end forever to the contention that the origin of the liability, whether statutory or otherwise, made any difference.

Article XIII, Section 3, of the Ohio constitution declared this liability without providing a remedy. But a right without a remedy is a contradiction and paradox, because our law presupposes a remedy for every right. The remedy which was cre-

ated with this right for its enforcement is well defined in the decisions of the Supreme Court of the State of Ohio, which we have cited, construing the constitutional provision and its manner of enforcement in Ohio courts.

The right created is unquestionably enforceable in a proper case by the United States Circuit Court under the authorities which we have cited at length in this point. Particular requirements of the Ohio statute as to manner of procedure in Ohio courts, or even attempting to restrict the broad equitable jurisdiction of a United States Circuit Court in the enforcement of this right, are matters which the court below should not have considered.

In *American File Co. v. Garrett*, 110 U. S., 288, 292, the stockholders' liability under the Rhode Island statute by suit in equity against the corporation and all the stockholders within the district seems to have been enforced without question by the Circuit Court of the United States for the District of Rhode Island.

The equitable jurisdiction of the Circuit Courts of the United States is uniform throughout the Union and cannot be enlarged or diminished by State statutes (Smith v. Railroad, *supra*).

While it is true that the laws of Ohio can have no extraterritorial force and effect, it is likewise true that Ohio law in the Circuit Court of the United States for the Southern District of New York is not foreign law, pleaded and proved as fact, but is judicially taken notice of without averment or proof in the same manner as an act of Congress.

> Hanley v. Donoghue, 116 U. S., 1, 6, and cases cited.

In *Owings v. Hull*, 9 Peters, 607, 624, Mr. Justice STORY said:

"We are of opinion that the Circuit Court was bound to take judicial notice of the laws of Louisiana. The Circuit Courts of the United States are created by Congress, not for the purpose of administering the local law of a single state alone, but to administer the laws of all the states in the Union, in cases to which they respectively apply. The judicial power conferred on the general government, by the constitution, extends to many cases arising under the laws of the different states. And this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the states. That jurisprudence is then, in no just sense, a foreign jurisprudence, to be proved in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established; but it is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts."

No principle of comity is here invoked. We do not ask the court to recognize, adopt or enforce extraterritorially any statute of Ohio. A citizen of Connecticut, suing citizens of New York and Ohio in a Federal Court where jurisdiction is based upon diverse citizenship under the Constitution of the United States and Act of Congress, demands that full force and effect be given in the court below, not to the laws of Ohio, but to the general rules and principles of common law in construing and enforcing certain rights growing out of a contractual relationship voluntarily entered into by the parties. The case is one where the parties

have contracted with reference to certain laws. These laws are judicially known to the court and the laws governing this contract obligation *are law*, not facts, in this court.

State courts for reasons of local policy may refuse to enforce liabilities which accrued under the laws of another foreign state; but a citizen of Connecticut suing citizens of New York and Ohio is given the constitutional right to come into the Federal Courts, which will frequently enforce an obligation that the courts of the state in which it is sitting do not enforce. Barrow Steamship Co. vs. Kane, 170 U. S., 100; and the Federal Court must enforce that right, if it is a general contract right, with a remedy that is in its nature transitory. Railway Co. vs. Whiton, *supra;* Dennick vs. Railroad Co., *supra.*

THIRD POINT.

Complainant seeks to enforce this liability precisely as it is enforced in Ohio.

In Fourth National Bank v. Francklyn, 120 U. S., 747, 758, Mr. Justice GRAY said:

"In all the diversity of opinion in the courts of the different states, upon this question of how far a liability imposed upon stockholders in a corporation by a law of the state which creates it can be pursued in a court held beyond the limits of that state, no case has been found in which such a liability has been enforced by any court without a compliance with the conditions applicable to it under the legislative acts and judicial decisions of

the state which creates the corporation and imposes the liability. To hold that it could be enforced without such compliance would be to subject stockholders residing out of the state to a greater burden than domestic stockholders."

The court was speaking of a liability under the Rhode Island statutes which provided that only judgment creditors of the corporation could enforce it, and it was held that one who was not a judgment creditor could not enforce it.

It is also undoubtedly true that a proportionate liability is enforceable only by an appropriate remedy which is by suit in equity; and especially is this true where the same statute which declares the liability provides for a remedy in the Chancery Courts; the remedy in such case is exclusive and the liability cannot be enforced elsewhere by action at law (Pollard vs. Bailey, 20 Wall., 520).

The whole matter was stated very clearly by this court in the recent cases of Slater vs. Mexican National Railroad, 194 U. S., 210, and Davis vs. Mills, 194 U. S., 451, 454. In the latter case the court repeated the language from the former case:

"But, as the source of the obligation is the foreign law, the defendant, generally speaking, is entitled to the benefit of whatever conditions and limitations the foreign law creates."

The conditions and limitations created by Ohio law upon the enforcement of the liability of stockholders of Ohio corporations are clearly stated in Harpold v. Stobart, 46 Ohio St., 397, from which we have already quoted, and the cases therein cited.

The action must be for the benefit of all the creditors, against the corporation and against all

the stockholders within the jurisdiction. The obligation is collateral and the right of contribution exists.

It follows that the creditor must go into the jurisdiction where he finds the corporation. But that is not necessarily Ohio. And if this right of the creditors is of a general contractual nature and diverse citizenship exists the creditors cannot be confined to Ohio courts, but may surely sue in any Circuit Court of the United States where the corporation and one or more stockholders are found. An Ohio corporation may be found and sued in the United States Circuit Court for the Southern District of New York (St. Louis, &c., Railway vs. McBride, 141 U. S., 127; Central Trust Co. vs. McGeorge, 151 U. S., 129; Interior Construction Co. vs. Gibney, 160 U. S., 217, 219; *In re* Keasbey and Mattison Co., 160 U. S., 221, 229; N. E. Mutual Life Ins. Co. vs. Woodworth, 111 U. S., 138, 146, and cases cited; Barrow Steamship Co. vs. Kane, 170 U. S., 100).

Upon the certificate in this case it must be assumed that the defendant corporation for the debts of which the stockholders are collaterally liable, is before the court (Cert., fol. 1).

This fact of joinder of the corporation distinguishes this case, on the facts, from every case we have found in the books involving the enforcement extraterritorially in a Federal Court of the Ohio liability or a similar proportionate liability.

In State National Bank vs. Sayward, 91 Fed. Rep., 443, the United States Circuit Court of Appeals for the First Circuit said:

"The statute means, after getting jurisdiction of all parties within reach of the process of the forum

where the debtor can be served, and the ascertainment of all the liabilities and assets of the corporation, that judgment shall go against a stockholder for an amount commensurate with the equitable proportion which his holding sustains to the capital stock, and all the indebtedness not covered by the assets and which he in equity and in view of the circumstances should be required to pay, rather than an arbitrary right of recovery in advance of an equitable accounting. This is according to equity, according to the construction which the highest court of Ohio has placed upon the statute and it is simple justice. * * * It is hardly necessary to state that this case is decided upon the want of jurisdiction of the necessary parties and not upon the ground that the Ohio remedy is not an enforceable remedy in a Federal Court upon proper joinder of necessary parties and lawful service."

There is no right in the stockholders of this corporation to be sued only in Ohio courts. They did not voluntarily assume this liability to the creditors only in the event that they should come within reach of process of Ohio courts. Such a contract could neither be made nor imposed by statute. (Insurance Co. vs. Morse, 87 U. S., 445; Barron vs. Burnside, 121 U. S., 186). The stockholders, foreign as well as domestic, agreed to a collateral liability for corporate debts, enforceable in an action against the corporation and all stockholders within the jurisdiction of the forum where the corporation should be found.

State courts have stated their unwillingness to enforce a proportionate liability created by the laws of another state for various reasons which we think we have shown are not applicable in federal

courts. The Supreme Court of Massachusetts, for instance, has given as a reason for such unwillingness, the local *policy of that state* (Ericksson vs. Nesmith, 15 Gray, 221); that it is not advisable to enforce a stockholders liability different from that of a stockholder of a Massachusetts corporation (New Haven Horse Nail Co. vs. Linden, 142 Mass., 349); and that the courts of the state which created the corporation alone could afford complete and effective judicial relief (Post & Co. vs. Toledo, etc., R.R. Co., 144 Mass., 341). In all of these cases great emphasis is laid upon the fact that the statutes of a State have no force *ex proprio vigore* beyond the territorial limits of the State, and that they could be enforced in Massachusetts only as a matter of comity. In none of the cases was the corporation joined as a party nor are the cases at all in point for us. In Hale vs. Hardon, 95 Fed. Rep., 747, 751, the United States Circuit Court of Appeals for the First Circuit said:

"It would not be useful to undertake a review of the decisions of the various states, and it is quite needless to say that we must follow the decisions of the Supreme Court, so far as they cover the question in the case, and as to particular questions, if any, not covered by the Supreme Court decisions, that we should, in cases of this character, be governed by the judicial policy of the Federal Law, rather than that of any particular state."

The courts of the various States exercise a wide discretion in the matter of assuming jurisdiction and enforcing contract liabilities. For this reason and as a protection against harsh rules arising from local policy and prejudice, the Constitution

of the United States gives to every citizen the absolute right to enforce in federal courts every general contract liability against a citizen or citizens of another state. As Mr. Justice STORY said, the Circuit Courts of the United States are created by Congress, not for the purpose of administering the local law of a single State only, but to administer the laws of all the States in the union, in cases to which they respectively apply. (Owings v. Hall, *supra*).

This liability is enforceable in the Circuit Court of the United States for the Southern District of New York upon joinder and service of the Ohio corporation and of all stockholders within the jurisdiction, unless the cause of action created for its enforcement is one which a court with full equity powers cannot enforce. It cannot be said that a cause of action which, as we have shown, was spelled out in its entirety by equity courts of Ohio, under the general rules of Chancery practice and procedure, is not enforceable on the equity side of the federal court sitting in New York. The complainant suing for the benefit of all the creditors has come into the forum where the corporation is found and joining with the corporation all of the numerous stockholders within the jurisdiction, demands the enforcement of their contract obligation in precisely the manner it is enforced in Ohio courts under the Ohio law. This federal court of equity will take jurisdiction where State courts might refuse (Barrow Steamship Co. vs. Kane, 170 U. S., 100). Having before it the corporation it will make the necessary ascertainments as to who are creditors, who are stockholders and the corporate assets and liabilities, and enforce against those stockholders

who are served with process the contract liability which they have incurred. If, as may frequently happen, the assets have been entirely exhausted and the debts exceed the capital stock, the ascertainments are easily made.

It will not frequently happen that an Ohio corporation can be sued by its creditors in the United States Circuit Court for the Southern District of New York. All of the creditors must be citizens of some other State than Ohio to give jurisdiction. The corporation must be found within the district to be served with process, and it must waive its personal privilege to be sued in the district in which the complainant or defendant resides. (Act of August 13, 1888, C. 866.) The fact that these conditions have combined in this case to give the court below jurisdiction over the corporation singles this case out from the mass of conflicting decisions in the courts of the various States and from all cases which have arisen in the federal courts, involving the enforcement, extraterritorially, of this or a similar liability.

It is the case of creditors, non-resident of Ohio, suing stockholders who are non-residents of Ohio, for the debts of an Ohio corporation that was found in New York. Such being the fact this court is not asked by the appellant to establish any new rule or precedent which might prove far reaching and dangerous in its results. The case is not important in its general bearings. It involves merely the right of these creditors in this manner to enforce the liability of these stockholders of this Ohio corporation which has been found and served in the Southern District of New York. Upon reason and the authority of previous decisions of this court, we think we are entitled to our relief in this

action. No large question of judicial policy on the facts as stated is involved in a decision sustaining this action.

The court will merely reaffirm what we understand to be the established rule that a federal court of equity can and will enforce every contractual obligation in an action between citizens of different States, upon joinder and service of the parties indispensable to a final decree.

If, on the contrary, the court refuses to enforce this liability in this action, not only is serious injustice done to creditors of this particular Ohio corporation by depriving them of what we believe to be a substantial property right, but also a new, anomalous and most dangerous precedent will be established and an exception made to what we believe has always been the universal rule that, where jurisdiction is based upon diverse citizenship, a federal court will enforce every general contract obligation upon proper joinder and service of the parties indispensable to full, complete and final relief. If the proper parties are before the court, and diverse citizenship exists, the relief follows as of course.

FOURTH POINT.

The power of the Ohio legislature over the liability declared by the constitution is limited to a reasonable control of an adequate remedy for its enforcement in Ohio courts.

In Willis v. Mabon, *supra*, Mr. Justice MITCHELL, speaking of an action to enforce the Minnesota liability *in Minnesota courts*, at page 154, said:

"Of course, the remedy is always within the control of the legislature, and may be changed as they see fit, provided only it remains adequate. It is entirely competent for them to provide a new and statutory remedy, and make it exclusive if they see fit."

The Ohio legislature undoubtedly has unlimited power over procedure in Ohio courts. Prior to the adoption of this constitutional provision the legislature also had unlimited power to secure dues from corporations by such individual liability of stockholders and other means as it saw fit.

It is this second power that is *recited* in the first clause of Article XIII, Section 3 of the Constitution:

"Dues from corporations shall be secured by such individual liability of stockholders, and other means, as may be prescribed by law."

This clause standing alone means practically nothing. It recites a power universally recognized as existing in the Legislature, *for the sole*

purpose of limiting it. The limitation upon this power is then declared:

"But in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock."

It is this limitation upon the otherwise unlimited power of the legislature, that declares the liability.

The power of the legislature over the procedure in Ohio courts for the enforcement of the liability declared, is unimpaired, but the legislature cannot impair, diminish or destroy that liability. The remedy for its enforcement in Ohio courts must be adequate; every stockholder of an Ohio corporation, within reach of process of Ohio courts or beyond it, resident or non-resident, must remain liable for the debts of the corporation as declared by the Constitution. Any Ohio statute, remedial in form or otherwise, attempting to impair, diminish or destroy the liability of any stockholder which is declared by the Constitution, is null and void. (Ohio vs. Sherman, 22 Ohio St., 411, 430.)

In Kirtley vs. Holmes, 107 Fed. Rep., 1, Mr. Justice DAY, speaking for the United States Circuit Court of Appeals for the Sixth Circuit, after referring to the Ohio statute relating to procedure in Ohio courts, said:

"The Ohio statute has not, however, undertaken to absolve other stockholders from their contractual obligation. That still exists. It is a right of the creditor. In consideration of the liability of the stockholder, foreign as well as domestic, credit was extended to the corporation. Upon every principle of equity and justice this liability should

be enforced, if it can be without violating the principles of law, or unjustly discriminating against citizens of another jurisdiction."

The power of the Ohio legislature to impose upon stockholders a greater liability than the minimum declared by the constitution, has never been exercised. For the purposes of this argument it need not be considered.

The liability herein sought to be enforced finds its origin in the mandate of the constitution, directed not to the legislature, *but to the courts*, operating, it is true, as a limitation upon the power of the legislature and as an inhibition, but declared by a higher law than legislative enactment.

The power over this liability which remains in the legislature is merely the reasonable control of an adequate remedy for its enforcement in Ohio courts.

FIFTH POINT.

The decision of the court below resulted from an erroneous legal presumption based upon the false premise that the legislature created and controlled the right.

The erroneous legal presumption was that mere laws of procedure prescribed by the Ohio legislature for use in Ohio courts necessarily governed in courts of another jurisdiction because coupled with the statute creating the right.

The opinion of court below is set forth in the certificate at folio 5.

The only authority for the very forced construc-

tion of the statute and its application to the present bill of complaint, resulting in a dismissal thereof, is the alleged rule of law said to have been established by the decision of this court in Pollard v. Bailey, 20 Wall., 520, and re-affirmed in Fourth National Bank v. Francklyn, 120 U. S., 747. The language of the opinion in Pollard v. Bailey, *supra*, which has been quoted in support of the alleged rule of law, is as follows:

"The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purposes of its creation and provide for the manner of its enforcement. * * * *The liability and the remedy were created by the same statute.* This being so, the remedy provided is exclusive of all others. A general liability created by a statute without a remedy may be enforced by an appropriate common law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed."

We wish to show that the court below proceeded upon the theory that the liability herein sought to be enforced was *created* by legislative enactment and that the legislature had endowed this creature of its will with certain attributes, among others having coupled with it a remedy which was not the appropriate common law action for its enforcement, but a special statutory form of procedure which *taken literally* must be pursued in the enforcement of the liability.

We do not think the rule of Pollard v. Bailey, *supra*, will stand any such construction, but it was so construed and applied in this case. Neither Pollard v. Bailey, *supra*, nor Fourth National Bank v. Francklyn, *supra*, had anything to do with or contained any reference to forms of procedure. The case of Pollard v. Bailey, *supra*, merely held that an action at law would not lie where a bill in equity was prescribed by the statute creating the liability, which was furthermore a *proportionate* liability.

Whitman vs. Oxford Nat. Bank, 28 C. C. A. Rep., 404, was before the United States Circuit Court of Appeals for the Second Circuit in 1898. It was an action at law by one creditor against one stockholder of a Kansas corporation to enforce the stockholder's liability for the corporate debts under the Kansas law. The Kansas remedy was by such action. The Circuit Court of Appeals sustained the action, but the opening language of its opinion is as follows:

"It is to be premised, as was clearly shown by Justice CLIFFORD in Morley vs. Thayer, 3 Fed., 739, with respect to this particular constitutional provision, that it is not self-executing in its character, and that statutory legislation was, therefore, required to carry it into effect (Groves vs. Slaughter, 15 Pet., 449; Wells vs. Robb, 43 Kansas, 201; 23 Pac., 146). It is also to be premised, as stated in Pollard vs. Bailey, 20 Wall., 520, and reaffirmed in Bank vs. Francklyn, 120 U. S., 747; 7 Sup. Ct., 757, that the statutory remedy is exclusive."

The Court then cites the language of the opinion in Pollard vs. Bailey, *supra*, which we have quoted.

The rule of Morley vs. Thayer, 3 Fed. Rep., 737, decided in the Circuit Court for the District of Massachusetts, referred to by the Circuit Court of Appeals, was as follows (p. 739):

"Enough appears in the constitutional provision itself to show that the view of the complainants, that the article is self-enforcing, cannot be sustained. * * * Power is plainly given to the Legislature in this case to pass laws to render stockholders individually liable for the debts of the corporation, and it doubtless makes it their duty to do so; but it by no means follows that the stockholder is made liable where there is no statute creating such liability or prescribing the means or mode of its enforcement."

So far as we have been able to discover, the decision in Morley vs. Thayer, *supra*, and the dictum which we have quoted from the opinion in Whitman vs. Oxford Nat. Bank, 28 C. C. A. Rep., 404, are the only authority for any such alleged rule as that upon which the decision in the present case is based.

When the case of Whitman vs. Oxford Nat. Bank, *supra*, reached the Supreme Court of the United States, the rule of Morley vs. Thayer, *supra*, was squarely repudiated. We refer to the opening language of the opinion in Whitman vs. Oxford Nat. Bank, 176 U. S., 559, which we have previously quoted at the beginning of the First Point of this brief.

In determining whether certain requirements of a purely remedial statute shall govern in a court of another jurisdiction, it makes a difference whether the statute prescribes a remedy for the enforcement of a liability created by the same

statute, over which the legislature has unlimited power and which it can impair, diminish or destroy or the statute merely prescribes a remedy for the enforcement of a liability which it did not create and which it can neither impair, diminish or destroy, its power over the liability being limited to a reasonable control of an adequate remedy for its enforcement in local courts. This liability had existed, by reason of the constitutional provision, in what may be properly called the common law of Ohio, for twenty-five years when the legislature first enacted a statute pertaining to the remedy.

SIXTH POINT.

The said requirements of Section 3260 of the Revised Statutes of Ohio, either as amended in 1894, or as amended in 1900, do not govern in a court of another jurisdiction unless they limit and qualify the right declared by the Ohio Constitution.

(*a*) *The lex loci contractus governs as to the substance or obligation of a contract, while the lex fori governs the form of action or procedure.*

This proposition (*a*) is too fundamental and well established in our law to be questioned. Chancellor KENT, in his Commentaries, pp. 461-462, states it as follows:

"Remedies upon contracts and their incidents are regulated and pursued according to the law of the place where the action is instituted, and the *lex loci* has no application. *Actor sequitur forum rei.* The *lex loci* acts upon the right; the *lex fori*

on the remedy. This is the rule in all civilized countries; and it has become part of the *jus gentium.*"

See also footnote to above citation in Fourteenth Edition for authorities; also numerous cases collected and reviewed by Mr. Raleigh C. Minor in Harvard Law Review, Volume XVI, page 262, entitled "Conflict of Laws:—Substance or Obligation of Contract Distinguished from Remedies."

(*b*) *This is true whether the origin of the liability be in the statute or the common law and whether the remedy be statutory or otherwise.*

We are dealing here with remedies upon contracts and their incidents, for this liability, though statutory in its origin, is contractual in its nature. (Whitman v. Oxford Nat. Bank, 176 U. S., 559).

In support of proposition (*b*) we refer to Dennick v. Railroad, 103 U. S., 11; Davis v. Mills, 194 U. S., 451, and Blair v. Newbegin, 65 Ohio St., 425, and cases therein cited.

The opinion of the learned court in the last case, holding that Ohio courts in enforcing the Kansas liability are not concerned with the form of remedy in Kansas courts, is a very able brief for the appellant on this point, and indicates precisely what view the Supreme Court of Ohio would take of Section 3260 of the Revised Statutes of Ohio, in any of its forms.

SEVENTH POINT.

The said requirements of Section 3260 of the Revised Statutes of Ohio, as amended in 1894, do not limit or qualify the substantive right declared by the constitution.

By "said requirements" we understand is meant the requirements which the record shows were not complied with in this bill of complaint and for non-compliance with which the bill was dismissed.

Referring to fol. 1 of the certificate and to the opinion of the court below, quoted in full at fol. 5 of the certificate, we see that absolutely the only requirement of Section 3260 of the Revised Statutes of Ohio, as amended in 1894, which was not complied with in this complaint, is the one that the action shall be against "all holders or owners of stock" and "against all persons liable as stockholders."

A later portion of the same section provides that "judgment shall be rendered against the stockholders who have been served with summons * * * " (fol. 3). It, therefore, seems clear that the requirement is one of form merely. All stockholders must be *named* as defendants, and judgment will be rendered against such as can be served.

We are not aware that the jurisdiction of Ohio State Courts is limited by the residence of parties. We, therefore, find no provision in the Ohio statute for an action against stockholders out of the jurisdiction. We do find provision for a judgment against all such stockholders, resident and non-resident of the State of Ohio, who can be reached by the process of its courts. Suppose the

clause "jointly against all the holders or owners of stock," to which so much importance is attached, were followed by the words "within the jurisdiction of the court." Surely, if the statute read thus, the decision could not have been rendered. But do these added words mean anything? Obviously they do not, unless there are stockholders who by reason of their residence are not within the jurisdiction. Where, then, is there any requirement in the Ohio statute for the enforcement of this liability by a suit against stockholders not within the jurisdiction? We respectfully submit that the decision of the learned court below (fol. 5) shows on its face that the court proceeded upon the erroneous theory that the same statute which declared the liability provided the remedy and that the requirements of the local remedy, taken literally, were necessarily limitations and conditions imposed upon the substantive right.

EIGHTH POINT.

Section 3260 of the Revised Statutes of Ohio, as amended in 1900, is not literally the exclusive remedy for the enforcement of stockholders' liability under the Ohio law which had accrued prior thereto.

If this remedy is literally exclusive it is wholly inadequate for the enforcement of the liability of non-resident stockholders. The sole provision which it makes for the enforcement of the liability of stockholders beyond the reach of process of Ohio Courts, is by an action to be brought by an Ohio receiver in courts of other jurisdictions (fol.

4). We understand that such an action would not lie. The stockholders are not liable in an action brought by a receiver in Ohio courts, and therefore a receiver could not enforce the liability against stockholders in other jurisdictions. The liability can only be enforced in an action brought by one creditor for the benefit of all the creditors. (Umsted v. Buskirk, 17 Ohio St., 114). Non-resident stockholders never agreed to become liable in a manner other and different from resident stockholders (Fourth Nat Bank v. Francklyn, *supra*). The liability as it is enforced in Ohio being to the creditors, it cannot elsewhere be enforced by a receiver (Hale v. Allinson, 188 U. S., 56).

If this statute, as amended in 1980, attempts to destroy the liability of non-resident stockholders which had accrued under the Ohio law prior thereto, it violates the contract obligation clause of the Constitution of the United States (Hawthorn v. Calef, 2 Wall., 10).

Furthermore, while the Legislature has control of remedies and may change them at will, it cannot, nevertheless, exercise this power in an arbitrary and unreasonable manner, so as to destroy entirely the liability of non resident stockholders, which had previously accrued (See Davis v. Mills, 194 U. S., 451, 456, 457).

Again, if this form of procedure is exclusive, the amendment of 1980 violates Article XIII, Section 3 of the Ohio Constitution in attempting to relieve non resident stockholders from the liability therein declared. If the exclusive remedy for the enforcement of this liability is by action in a common pleas court of Ohio, and there is no means provided for the enforcement of the liability against stockholders beyond the reach of process,

which are good in law, it would seem that the remedy is not adequate. An attempt by the legislature to make exclusive a form of remedy which is inadequate violates Article XIII, Section 3, of the Ohio Constitution by cutting down the liability of non-resident stockholders therein declared (Kirtley vs. Holmes, 107 Fed. Rep., 1).

Assuming that the remedy prior to the amendment of 1900, was transitory and could be pursued in courts of other jurisdictions, the amendment of 1900, construed as providing an exclusive remedy by action in the common pleas court of Ohio, is repugnant to Article 3, Section 2 of the Constitution of the United States (Insurance Co. vs. Morse, 20 Wall., 445; Barron vs. Burnside, 121 U. S , 186).

Finally, under the numerous authorities which we have cited in this brief affirming the broad and general jurisdiction of the federal courts of the United States, in actions between citizens of the United States, and that State legislation cannot affect such jurisdiction, we cannot believe that creditors of an Ohio corporation who had already begun an action to enforce the stockholders' liability in the Circuit Court of the United States for the Southern District of New York, and against whom the statute of limitations may have run in the interim, can be denied their right of action by reason of any act of the Ohio Legislature subsequent to the filing of their bills.

In short, after this suit was begun the Ohio legislature, in the proper exercise of its power to control procedure in Ohio courts, enacted a law providing a means for the enforcement of this liability in the common pleas court of Ohio; the procedure vaguely outlined in this amended stat-

ute of 1900, indicates a remedy adequate in Ohio courts; the legislature, however, attempted to go farther and provide a remedy in courts of other jurisdiction by action to be brought in the name of a receiver; as we understand, the Supreme Court of the United States in Hale v. Allinson, 188 U. S., 56, has decided that such an action would not lie, at least against stockholders in other jurisdictions who became such prior to the adoption of the new statute; the amended act of 1900, therefore, so far as it attempts to provide an exclusive remedy against non-resident stockholders is not only inadequate but absolutely a nullity. It cannot reasonably be construed as an exclusive remedy against non-resident stockholders because it is no remedy at all. The right, therefore remains in the creditors to enforce this liability in a proper forum against the non-resident stockholders, upon joinder of proper parties, precisely as it is enforced in Ohio courts against stockholders domiciled in Ohio.

NINTH POINT.

The questions certified should be answered in the affirmative.

The appellees herein are unable to show any condition or limitation upon the substantive right to enforce this contractual obligation declared by the constitution and voluntarily assumed by the stockholders that has not been complied with in this suit.

The appellees are likewise unable to show any defect of parties defendant in equity who are indispensable to a decree which shall be a full and

final determination of the liability herein sought to be enforced nor any inability whatsoever on the part of the federal courts in New York to enforce this liability in this suit, precisely as the same liability is enforced by Ohio courts against Ohio stockholders.

We have shown a general contractual right, declared by the Ohio constitution, with an appropriate transitory cause of action for its enforcement, which was worked out in its entirety by the equity courts of Ohio.

We have further shown that where such a right exists, whether statutory in its origin or not, federal courts having jurisdiction of the parties indispensable to a proper decree in equity must enforce this right in actions between citizens of different States.

We fail to see how the said requirements of the Ohio statute in either form, whatever they may be, can govern in the court below when said statute does not prescribe the remedy for the enforcement of this liability, but merely contains certain requirements as to procedure in the courts of that State. To find the remedy one must look into the decisions of the Ohio courts. The remedy is the appropriate remedy for the enforcement of a proportionate, collateral liability, and that remedy has been followed herein.

The provision of the Ohio constitution is surely self-executing to the extent of declaring the liability. The Ohio courts in construing this provision spelled out the remedy. Nothing remained thereafter for the Ohio legislature except to regulate forms of action and manner of procedure in Ohio courts. It neither created the liability, as the

learned court below supposed, nor provided the remedy for its enforcement.

Wherefore, the appellant respectfully submits that both of the questions certified should be answered in the affirmative.

FREDERICK C. McLAUGHLIN,
Of Counsel and Solicitor for Appellant,
Number 26 Liberty Street,
Manhattan,
The City of New York,

HARVEY SCRIBNER,
Of Counsel.

Toledo, Ohio.

FILE COPY.

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JAN 16 1905
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 167.

THE MIDDLETOWN NATIONAL BANK

vs.

TOLEDO, ANN ARBOR AND NORTH MICHIGAN RAILWAY COMPANY *et al.*

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

JUDSON & HALE,
Solicitors for Defendant,
DAVID B. IVISON,
40 Wall St.,
New York, N. Y.

CHARLES N. JUDSON,
WILLIAM B. HALE,
of Counsel.

LIVINGSTON MIDDLEDITCH CO., 68 DUANE ST., N. Y.

Supreme Court of the United States,

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ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

STATEMENT.

This case comes before the Court upon two questions of law certified to this Court by the Circuit Court of Appeals for the Second Circuit.

The suit is a bill in equity by a judgment creditor of the defendant railway company, an Ohio corporation, to enforce the liability of stockholders for the debts of the company, imposed by the laws of Ohio. The suit was brought in the Southern District of New York, against such stockholders only as were residents of that district. Stockholders residing in Ohio and elsewhere were not joined. The corporation was named as a defendant and an attempt made to serve it in New York.

The defendants demurred for (1) want of juris
tion; (2) want of equity; and (3) want of indispens
parties. The Circuit Court sustained the demurrer.

The constitution of Ohio (1851), art. XIII, sectio
provides as follows:

"Dues from corporations *shall be secured by such*
dividual liability of the stockholders, and other mea
as may be prescribed by law; but in all cases, each sto
holder shall be liable, over and above the stock by him
her owned, and any amount unpaid thereon, to a furt
sum, *at least equal in amount to such stock.*"

In pursuance of this provision of the constitution
legislature adopted statutory provisions with respect
the stockholders of certain corporations, which appear
the Revised Statutes of 1880, section 3258, in the follo
ing form:

"The stockholders of a corporation which may
hereafter formed, and such stockholders as are now lia
under former statutes, shall be deemed and held liable,
addition to their stock, in an amount equal to the stock
them subscribed, or otherwise acquired, to the creditc
of the corporation, to secure the payment of the debts a
liabilities of the corporation."

Section 3260 of the Revised Statutes of 1880,
amended in 1894, provides as follows:

"A stockholder or creditor may enforce such liabili
by action jointly against all the holders or owners
stock, which action shall be for the benefit of all the cred
tors of the corporation, and against all persons liable
stockholders; and in such actions there shall be foun
and determined the amount payable by each person liab
as stockholder on all the indebtedness of the corporatio
in which adjudication no costs shall be taxed to nor co
lected of any stockholder to an amount which, togethe

with the amount to be paid on said indebtedness, will exceed the amount of the stock on which he is liable, provided, that in any such action, the plaintiff may file in the Court a sworn statement that a stockholder or stockholders or the legal representative of a deceased stockholder have not been summoned, giving their residence if known, and that it is impracticable to secure service of summons upon such stockholders or such legal representatives of a stockholder, and remitting from the claims of the plaintiff or of other creditors consenting, so much as may be found payable by such stockholders not served with summons except those who may be insolvent or non-resident of the State, and judgment shall be rendered against the stockholders who have been served with summons for the pro rata amount for which they would be liable if all solvent stockholders resident of the State were served with summons; and when a creditor has prosecuted against a corporation an action of (at) law begun before any action to enforce the stockholders' liability, and has recovered final judgment only after such an action to enforce the stockholders' liability has been prosecuted to a final decree in the Court in which the action was commenced, such judgment creditor may bring a like action against the stockholders of the corporation to enforce such judgment at any time within four years after the recovery of his said judgment, but the stockholders shall not be liable for any amount in excess of that provided in section 3258."

As so amended this section stood at the time when this suit was begun. Afterwards, in 1900, but before the filing of the second amended bill of complaint, the section as further amended and supplemented, provided as follows:

"Section 3260. Whenever any creditor of a corporation seeks to charge the directors, trustees or other superintending officers of a corporation, or the stockholders thereof, on account of any liability created by law, he may file his complaint for that purpose in any common

pleas court which possesses jurisdiction to enforce su
liability.

"Section 3260 (a). The Court shall proceed thereon,
in other cases, and, when necessary, shall cause an accou
to be taken of the property and obligations due to and f
such corporation, and may appoint one or more receiver

"Section 3260 (b). If, on the coming in of the answer
upon the taking of such account, it appears that such co
poration is insolvent, and has not sufficient property
effects to satisfy such creditor, the Court may proce
to ascertain the respective liabilities of the director
officers and stockholders, and enforce the same by i
judgment, as in other cases.

"Section 3260 (c). In all cases in which the director
or other officers of a corporation, or the stockholder
thereof, are made parties to an action in which a judg
ment is rendered, if the property of such corporation i
insufficient to discharge its debts, the Court shall giv
notice to non-resident stockholders, as provided in sec
tions 5048, 5049, 5050, 5051, or 5052 of the Revise
Statutes and shall first proceed to compel each stock
holder to pay in the amount due and remaining unpaid o
the shares of stock held by him, or so much thereof as i
necessary to satisfy the debts of the company.

"Section 3260 (d). If the debts of the company remain
unsatisfied the Court shall proceed to ascertain the re-
spective liabilities of the directors or other officers and
of the stockholders, and to adjudge the amount payable
by each, and enforce the judgment as in other cases. The
Court may authorize and direct the receiver to prosecute
such action in his own name as receiver, as may be neces-
sary, in other jurisdictions to collect the amount found
due from any officer or stockholder.

"Section 3260 (e). Whenever any action is brought
against any corporation, its directors or other superin-
tending officers, or stockholders, according to the provis-
ions of this chapter, the Court, whenever it appears nec-
essary or proper, may order notice to be published in such
manner as it shall direct, requiring all creditors of such

corporation to exhibit their claims and become parties to the action, within a reasonable time, not less than six months from the first publication of such order, and, in default thereof, to be precluded from all benefit of the judgment which shall be rendered in such action, and from any distribution which shall be made under such judgment.

"Section 3260 (f). Upon a final judgment in any such action against an insolvent corporation, the Court shall cause a just and fair distribution of the property and assets of such corporation or the proceeds thereof to be made among its creditors.

"Section II.—That said section 3260 be, and hereby is repealed.

"Section III.—This act shall apply to pending actions and shall take effect and be in force from and after its passage."

The Court below sustained the demurrer on the following grounds:

> "It is thought that the question raised by this demurrer should be decided upon the assumption that the action is the one provided for by sec. 3260, R. S. Ohio, as it stood after the amendment of 1894. Inasmuch as that section expressly provides for an action jointly against all the stockholders, including such as are out of the jurisdiction or for other causes cannot be served, and the complaint avers that there are stockholders who have not been made parties, there is a lack of parties defendant and the demurrer is sustained. If, moreover, the amendments of the statute passed in 1900 are to be considered, the position of the demurrants is even stronger. Manifestly this action is not the one thereby provided for."

QUESTIONS CERTIFIED

The two questions of law certified upon which the Court below desires the instructions of this Court are as follows:

First: Whether article XIII, section 3 of the Constitution of Ohio is so far self-executing that it may be enforced outside of the jurisdictions of said State without compliance of said requirements of sections 3260 of the Revised Statutes of said State as amended in 1894.

Second: Whether article XIII, section 3 of the Constitution of Ohio is so far self-executing that it may be enforced outside of the jurisdictions of said State without compliance with said requirements of sections 3260 of the Revised Statutes of said State as amended in 1894.

POINT ONE.

[illegible]

Whether or not a constitutional provision is self-executing depends upon the intention of the framers. A provision will be held to be self-executing only where there is a manifested intention that it shall go into immediate effect without the aid of any auxiliary legislation.

Am. & Eng. Encyc. Law (2nd Ed.), vol. 6, p. 987.
[illegible]
Cooley v. Stanglehaw, 15 Pet. (U. S.), 449.

"The cases are exceptional where constitutional provisions enforce themselves; ordinarily the labors of the convention have to be supplemented by legislation before becoming operative."

Fusz *v.* Spaunhorst, 67 Mo., 255, per Sherwood, *C. J.*

"Where a constitutional provision furnishes no rule for its own enforcement, or where it expressly or impliedly requires legislative action to give effect to the purpose contemplated, it is not self-executing."

Am. & Eng. Ency. Law (2nd Ed.), vol. 6, p. 915, tit. Constitutional Law. See also to same effect:

Morley *v.* Thayer, 3 Fed., 740, per Clifford, *C. J.*

"The question in every case is whether the language of a constitutional provision is addressed to the courts or the legislature. Does it indicate that it was intended as a present enactment, complete in itself as definitive legislation, or does it contemplate subsequent legislation to carry it into effect? This is to be determined from a consideration both of the language used and of the intrinsic nature of the provision itself. In the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts."

Willis *v.* Madson, 43 Minn., 150, 21 Am. St. Rep., 626, per Mitchell, *J.*, referring to a stockholders' liability clause in the Minnesota Constitution.

> "Where it is apparent that a particular provision of the organic law shall go into immediate effect without ancillary legislation, and this can be determined by giving full force and effect to all its clauses relating to the same subject, and the language is free from ambiguity, then it becomes the imperative duty of judicial tribunals to declare it self-executing; and where the provision is unambiguous and the purpose of the provision would be frustrated unless it be given immediate effect, it will be held self-executing."
>
> Tuttle *v.* National Bank of Republic, 161 Ill., 502, per Phillips, *J.*, speaking of a stockholder's liability clause.

The Constitution of Ohio, Art. XIII, Sec. 3, is as follows:

> "Dues from corporations shall be secured by *such individual liability of the stockholders,* and other means, *as may be prescribed by law;* but in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, *at least* equal in amount to such stock."

Obviously, and by its express terms, this provision contemplates ancillary legislation to carry it into effect. In the language of the Minnesota case, above quoted, it is addressed to the legislature and not to the Courts. The last clause is merely a limitation upon legislative discretion. The provision does not prescribe any definite and certain liability. It does not say that stockholders shall be liable in a sum equal to the amount of their stock. Such a liability, being definite and certain in amount, might be enforced by ordinary remedies in the Courts without further legislation. But it says that the liability shall be "at least equal in amount

to such stock." The amount is thus left wholly uncertain. No Court could enforce this provision standing alone, without adopting the minimum sum. But this would be fixing the amount of liability by judicial legislation, whereas the provision itself expressly commits this duty to the legislature. The two phrases, "such individual liability * * * as may be prescribed by law," and "at least equal in amount to such stock," show conclusively that the provision was addressed to the legislature and not to the courts, and that it was not intended to go into effect until the legislature had acted and prescribed the extent of the liability. The provision is, accordingly, not self-executing.

> In Barnes *v.* Wheaton, 80 Hun (N. Y.), 8, 29 N. Y. Supp., 830, it was held that the Ohio constitutional provision here in question is not self-executing. The same decision was made in Cleveland *v.* Kent, 87 Hun (N. Y.), 329, 34 N. Y. Supp., 427, and in Nimick *v.* Iron Works Co., 25 W. Va., 184. These cases were cited with approval in Marshall *v.* Sherman, 148 N. Y., 9.

There is no decision in Ohio or elsewhere in which the liability of a stockholder has been enforced solely by virtue of this constitutional provision. In pursuance of the constitutional mandate, the legislature adopted at an early day section 3258 of the Revised Statutes of Ohio. This section simply provided that stockholders should be liable, in addition to their stock, to a further sum *equal* to the amount of their stock. No remedy was provided to enforce this liability until many years later. But the statute having imposed a definite liability, which the constitution had not, the Courts very properly enforced the statutory liability by their ordinary remedies. If the

constitution had imposed a definite liability the Courts might have enforced it in the same way. Every case in the Ohio reports down to the enactment of section 3260, was expressly based on the statutory liability created by section 3258, and not upon the constitutional provision. The discussion in these cases was always as to the remedy to enforce the *statutory liability,* and never as to the remedy for, or the existence of, a constitutional liability.

Wright *v.* McCormack, 17 Ohio St., 87;
Unsted *v.* Baskirk, 17 Ohio St., 115;
Brown *v.* Hitchcock, 36 Ohio St., 667;
Hawkins *v.* Furnace Co., 40 Ohio St., 513;
Mason *v.* Alexander, 44 Ohio St., 325.

These cases have no relevancy upon the question whether or not the constitutional provision is self-executing and imposes a liability enforceable by ordinary judicial remedies. They are relevant, however, as showing that the liability of stockholders in Ohio corporations, is a statutory and not a constitutional liability.

As a general rule, constitutional provisions as to stockholders' liability are held to be not self-executing.

Am. & Eng. Ency. Law (2nd Ed.), vol. 6, p. 915, tit. *Constitutional Law.*

The constitution of *Kansas,* Art. 12, Sec. 2, provides:

"Dues from corporations shall be secured by individual liability of stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law."

The Courts of Kansas, and other states where this provision was sought to be enforced, have held that this provision is not self-executing, and that the stockholder's liability can only be enforced in accordance with the

statutes of Kansas, enacted to carry this provision into effect.

Henly *v.* Stevenson, Kan. 72 Pac. Rep., 518 (1903);
Woodworth *v.* Bowles, 61 Kan., 569;
Marshall *v.* Sherman, 148 N. Y., 9, 34 L. R. A., 757;
Tuttle *v.* National Bank, 161 Ill., 497;
Fowler *v.* Lamson, 146 Ill., 478, 37 Am. St. R., 163.

An important difference is to be noted between the provisions of the Kansas constitution and those of Ohio. The Kansas constitution prescribes a perfectly definite liability in an "amount equal to the stock owned by each stockholder." This might well be held to be self-executing, and the liability enforced wherever jurisdiction of the stockholder could be obtained. *The Ohio constitution, on the contrary, imposes no definite liability, but only "such individual liability * * * as may be prescribed by law * * * at least equal to the amount of such stock."* If the Kansas constitution is not self-executing, *a fortiori* the Ohio constitution is not self-executing. But even if the Kansas constitution is self-executing, that would be no authority for holding the Ohio constitution self-executing, because the respective provisions are radically different.

In *Minnesota*, a constitutional provision that "each stockholder in any corporation shall be liable to the amount of the stock held or owned by him" is held to be self-executing, because, unlike the Ohio constitution, it imposes as definite liability.

Willis *v.* Mabon, 48 Minn., 140.

A constitutional provision in *Missouri,* identical with that of Kansas, has been held not self-executing.

Morley *v.* Thayer, 3 Fed., 740.

In *California,* a constitutional provision that "dues from corporations shall be secured by such individual liability of the corporators, and other means as may be prescribed by law" and that "each stockholder * * * shall be individually and personally liable for his proportion of all its debts and liabilities" was held not self-executing because it was necessary for the legislature to fix the *amount* of the liability.

French *v.* Teschemaker, 24 Cal., 518.

This authority is directly in point because the Ohio constitution does not prescribe the amount of the liability, but remits that matter to the legislature.

The correct construction of the provision in question is that the first clause is a mandatory direction to the legislature to provide for the individual liability of stockholders in such amount as it deemed proper, subject to the limitation in the second clause that such liability should be "at least equal in amount to such stock."

This construction gives effect to the plain and obvious meaning of every word used. It is reasonable and involves no difficulties or injustice in carrying it into execution.

In Barnes *v.* Wheaton, 80 Hun (N. Y.), 8, 29 N. Y. Supp., 830, 833, this construction was adopted by a New York Court as the proper construction of the Ohio constitution. The Court said:

> "It is obvious that this provision of the constitution is not self-executing, but that its purpose was to

confer upon the legislature the power, and impose upon it the duty, of securing dues from corporations by imposing upon the stockholders of such corporations as were organized under the laws of that State an individual liability, and by such other means as, in its discretion, it should deem proper, but limiting such power and discretion by the provision that each stockholder should be made liable to an amount at least equal to the amount of the stock held by him; and we think that this provision does not, independent of a statute imposing such liability, confer upon the plaintiff any right to maintain this action."

This decision was cited with approval in Cleveland *v.* Kent, 87 Hun (N. Y.), 329, and in Marshall *v.* Sherman, 148 N. Y., 9.

The construction contended for by the complainant is shown by the following quotation from its brief in the court below:

"The enacting part of this constitutional provision is as follows: 'But in all cases each stockholder shall be liable * * * to a further sum at least equal in amount to such stock.' The other part of the section is merely a recital of a power which it would have had in the absence of the provision, and this power was stated for the obvious purpose of limiting it."

There are various objections to this construction. In the first place, the so-called "enacting" clause does not enact any definite liability. What is the amount of a stockholder's liability under it? In the second place, this construction rejects, as meaningless, the whole of the first clause, comprising more than half the provision, and also the words "at least" in the second clause. It is not permissible to reject terms in order to hold the

provision self-executing. Some reasonable meaning must be given to every word used, if at all possible.

See Tuttle *v.* National Bank, 161 Ill., 502.

Moreover, the above statement that the first clause was intended to limit the power of the legislature is not correct. That clause contains no limitation, but on the contrary, expressly authorizes the legislature to impose any liability it sees fit. It is a grant, not a limitation of power. The limitation is contained in the second clause, which provides that in imposing a liability, the legislature must impose a liability "at least equal in amount to such stock," but leaves the legislature at liberty to impose as much greater liability as it deems proper.

The objections to treating such a constitutional provision as self-executing have been forcibly stated by the Supreme Court of Illinois as follows:

> "If this provision is to be treated and construed as self-operating, then the clause 'and such other means as may be provided by law must be rejected as meaningless and held without force or effect.' The creditor must be confined to the security of the individual liability of stockholders to an amount equal to the stock owned by such stockholders. In the attempt to give construction to this clause of the constitution of Kansas, in the absence of legislation, we are confronted with a serious difficulty and much ambiguity. What stockholders are liable for dues from corporations? When are they liable? Is it the holder of the stock at the time the indebtedness is created, or at the time the indebtedness became due, or at the time suit is instituted to recover the dues owing by the corporation? All these questions arise in each case, and will not down without an answer. The instrument itself gives no light to determine these questions. * * * To treat the

provision as self-operating would do violence to two leading principles of construction; by rejecting a clause of the instrument and giving it no force and effect; and holding an ambiguous clause self-executing when that clause is of the most doubtful construction. It is apparent from a consideration of the provision itself, that legislation was contemplated as necessary to carry it into effect, and enable the remedy to be applied, and give the intended security to the creditor, and the clause cannot be treated or construed as self-operative." Tuttle *v.* National Bank, 161 Ill., 497; 34 L. R. A., 750, *citing* May *v.* Black, 77 Wis., 101; Groves *v.* Slaughter, 15 Pet. (U. S.), 449; Morley *v.* Thayer, 3 Fed., 737; Fusz *v.* Spaynhorst, 67 Mo., 256; French *v.* Teschemaker, 24 Cal., 518; Larrabee *v.* Baldwin, 35 Cal., 155; Marshall *v.* Sherman, 148 N. Y., 9.

The above language was used with reference to the constitution of Kansas, which as has been seen, declared a definite liability. *A fortiori,* it applies to the Ohio provision which declares no definite lability, but only such as the legislature may prescribe.

It is submitted that the Ohio Constitution, Art. XIII, sec. 3, is not self-executing because (1) it expressly contemplates and provides for legislative action to carry it into effect, and (2) it imposes no definite amount of liability, but expressly remits the duty of fixing the amount of liability to the legislature.

There is no hardship in holding this constitutional provision not self-executing, for the legislature acted promptly, prescribed the liability, and provided a remedy to enforce it. (Record, folio 2.)

As the provision is not self-executing, it, of course, creates no liability which can be enforced outside of Ohio, without compliance with the Ohio statutes which create

the liability and provide for its enforcement. Both questions certified, must therefore be answered in the negative.

POINT TWO.

IRRESPECTIVE OF WHETHER THE CONSTITUTIONAL PROVISION IS SELF-EXECUTING OR NOT, THE LEGISLATURE HAVING ACTED, AND PRESCRIBED A REMEDY, THAT REMEDY IS EXCLUSIVE, AND MUST BE FOLLOWED.

Long before any of the transactions involved in this suit, the Ohio legislature, in pursuance of the constitutional provision in question, enacted a statute prescribing the liability and providing a remedy for its enforcement (Record folios 2-5).

If, therefore, the constitutional provision is not self-executing, we have the ordinary case of a statutory liability coupled with a statutory remedy. In such cases the remedy forms an inseparable part of the liability and is exclusive.

Pollard *v.* Bailey, 20 Wall. (U. S.), 520;
Bank *v.* Francklyn, 120 U. S., 747;
Morley *v.* Thayer, 3 Fed., 741.

Statutory remedies for the enforcement of a stockholder's liability have been universally held to be exclusive.

Evans *v.* Nellis, 187 U. S., 271;
Hale *v.* Allison, 188 U. S., 56;
Pollard *v.* Bailey, 20 Wall. (U. S.), 520;
Bank *v.* Francklyn, 120 U. S., 747;
Morley *v.* Thayer, 3 Fed., 737;

Nimick *v.* Mingo Iron Works Co., 25 W. Va., 184;
Tuttle *v.* National Bank, 161 Ill., 34 L. R. A., 750;
May *v.* Black, 77 Wis., 101;
Miller *v.* Smith, R. I., 57 Atl., 634, (April 29, 1904);
Henly *v.* Stevenson, Kan. 72 Pac., 578 (1903);
Waller *v.* Hamer, 65 Kan., 168;
Barnes *v.* Wheaton, 80 Hun (N. Y.), 8;
Russell *v.* Pacific R. Co., 113 Cal., 258 (34 L. R. A., 747);
Savings Association *v.* O'Brien, 51 Hun (N. Y.), 45; 3 N. Y. Supp., 764;
Marshall *v.* Sherman, 148 N. Y., 9;
Cleveland, etc., R. Co. *v.* Kent, 87 Hun (N. Y.), 329, 34 N. Y. Supp., 427;
Howarth *v.* Angle, 162 N. Y., 179.

In Nimick *v.* Mingo Iron Works Co., 25 W. Va., 184, it was directly held that the statute under consideration, (Ohio Rev. Stat., Sec. 3260) provides the exclusive remedy. A similar decision under this statute was made in New York in Barnes *v.* Wheaton, 80 Hun (N. Y.), 8, and Cleveland Co. *v.* Kent, 87 Hun (N. Y.), 329. These cases have been cited with approval in Marshall *v.* Sherman, 148 N. Y., 9, and in Stoddard *v.* Lunn, 159 N. Y., 265, 273, 274.

But even if the constitutional provision were held to be self-executing, the legislature having acted and prescribed a remedy, that remedy is exclusive. So far as a statute does not contravene the constitution, it has equal force and effect. It is not claimed that the statute prescribing the remedy is unconstitutional. This Court has spoken in just this kind of a case. In Whitman *v.* Oxford Nat. Bank, 176 U. S., 559, the Court said:

"But this constitutional provision does not stand alone. The legislature of Kansas has acted on the

subject-matter, and the constitution and statutes are to be taken together as making one body of law; and it serves no good purpose to inquire what rights and remedies a creditor of a corporation might have, or what liabilities would rest upon a stockholder if either constitution or statutes stood alone and unaided by the other."

In Evans *v.* Nellis, 187 U. S., 271, this Court held that the remedy prescribed by the Kansas Statute of 1899, which is substantially the same as the Ohio Statute, was exclusive, and that therefore a receiver who had not brought an action against the corporation, as required by the statute, could not maintain an action in a federal court in another state against an individual stockholder for the amount of his statutory liability.

In Hale *v.* Allison, 188 U. S., 56, it was held by this Court that the statute of Minnesota furnished the exclusive remedy, although the Minnesota constitutional provision has always been held to be self-executing. The Court said:

"The constitution of Minnesota, it will be seen, simply imposes a double liability upon the stockholders. The statutes of the State provide the only means of there enforcing the liability." The Ohio statute as amended in 1900 is a substantial copy of the Minnesota statute.

In Willis *v.* Mabon, 148 Minn., 130, it was held that the legislature might provide an exclusive statutory remedy for the enforcement of a self-executing constitutional provision imposing a liability upon stockholders.

In Morley *v.* Thayer, 3 Fed., 737, it was held that the stockholders' liability clause of the Missouri constitution was not self-executing. But the Court, per

Clifford, *C. J.*, added: "Even if the rule would be otherwise, in case the legislature had failed to comply with the constitutional mandate, still it is clear that the statutes passed in fulfillment of that requirement constitute the unmistakable rule of decision, and furnish the only basis of judicial action" (*citing* Fusz *v.* Spaunhorst, 67 Mo., 256, 269; Railroad *v.* Buchanan, 39 Mo., 484, 489; French *v.* Teschmaker, 24 Cal., 518, 539). * * * The obligation or liability and the remedy are inseparable, and the party interested is confined to the remedy prescribed by the act and assented to by the stockholder. If the liability rested solely upon the contract, and the contract provided an adequate remedy, the parties would be restricted to that remedy, and every other would be excluded by necessary implication. * * * The statute remedy must be exclusively followed."

The complainant's argument that it claims under the constitution and that because the constitution provides no form of remedy, it may disregard the remedy provided by the legislature, is unconvincing and untenable.

Whichever of the statutory remedies existing at different times is applicable to this case, that remedy is exclusive. Accordingly a stockholder's liability cannot be enforced either within or without the State of Ohio, without compliance with the statutory provisions governing the remedy.

In Bank *v.* Franklyn, 120 U. S., 758, Judge Gray said:

"No case has been found in which such a liability has been enforced by any court without a compliance with the conditions applicable to it under the legislative acts and judicial decisions of the State which creates the corporation and imposes the liability. To hold that it could be enforced without such com-

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the statutory proceedings have been prosecuted to judgment in Ohio. In other words the exclusive statutory remedy must be pursued in Ohio and cannot be pursued in the Courts of another State. When, however, the facts necessary to fix the liability of the stockholders have been determined in the home state, ancillary proceedings may be brought in any state where the stockholders may be found to enforce their liability. In such proceedings they will be bound by the Ohio judgment so far as corporate affairs are concerned, but any defense peculiar to the individual stockholders will still be open.

The statutory remedy under Section 3260, either as first enacted or as amended in 1894 and 1900 is substantially an equitable proceeding by or on behalf of all stockholders against the corporation and all its stockholders in which the assets and liabilities of the corporation are ascertained, and the amount for which the stockholders are liable is fixed. The several liabilities of the stockholders for their proportionate part of this sum is brought into a common fund for the benefit of all the corporate creditors. This several liability of the stockholders for their proportionate part may be enforced in the statutory proceedings against stockholders who can be reached in Ohio. It may be enforced against non-resident stockholders by any appropriate form of proceeding wherever they may be found. But until this accounting has been had, and the amount due from stockholders has been ascertained, there is no liability which can be enforced in a foreign state. The accounting and ascertainments must be made in the statutory proceeding at the domicile of the corporation in Ohio.

It is well settled law that an exclusive statutory remedy to enforce a statutory liability can be pursued only in the home state. The plain reason is that the laws

of one state cannot prescribe modes of procedure to be followed in the Courts of another State. The laws of one State may create liabilities, and if no exclusive remedy is provided, such liabilities will be enforced in another State. But where such liabilities are enforced extra-territorially, the proceedings are always according to the laws of the forum. If, therefore, a liability is coupled with an exclusive statutory remedy, it necessarily follows that such remedy may be had only in the home State.

In Tuttle *v.* National Bank, 161 Ill., 497, 34 L. R. A., 750, it was held that the stockholders' liability under the constitution and laws of Kansas, would not be enforced by the Courts of Illinois against stockholders residing in Illinois until after proceedings to fix the liability had been had in Kansas. The Court said:

> "The principle is uniformly recognized that the relation of a stockholder to a corporation is determined by the laws of the State of the creation of the corporate body, and where the laws of the domicile of the corporation creates a special remedy, that remedy cannot be enforced except within the jurisdiction of the domicil of the artificial body (*citing* Erickson *v.* Nesmith, 4 Allen (Mass.), 233; Morgan *v.* Neville, 74 Pa. St., 52; Waldron *v.* Ritchings, 3 Daly (N. Y.), 288; Seigel *v.* Robinson, 56 Pa. St., 19, 93 Am. Dec., 775; Ludlow *v.* Van Rensslaer, 1 Johns (N. Y.), 95; Post *v.* Toledo, etc., R. Co., 144 Mass., 341, 59 Am. R., 86; Bank *v.* Rindge, 154 Mass., 203, 13 L. R. A., 56; Marshall *v.* Sherman, 148 N. Y., 9, 34 L. R. A., 757). * * * A remedy special to a particular foreign state is not, by any principle of comity, enforceable here, and must be applied within the jurisdiction of the domicil of the corporation (*citing*, Fowler *v.* Lamson, 146 Ill., 472; Young *v.* Farwell, 139 Ill., 326; Christenson *v.* Eno, 106 N. Y., 97, 60 Am. R., 429; National Bank *v.* Dillingham, 147

> N. Y., 603; Lowry *v.* Inman, 46 N. Y., 119.) * * * It would be hostile to every principle of sovereignty to be compelled to import into this State the peculiar remedies and various special methods of procedure invented by the legislation of the various states. This principle has been generally recognized (*citing* Young *v.* Farwell, 139 Ill., 326; Patterson *v.* Lynde, 112 Ill., 196; May *v.* Black, 77 Wis., 101; Nimick *v.* Mingo Iron Works Co., 25 W. Va., 184; Allen *v.* Walsh, 25 Minn., 542; Peck *v.* Miller, 39 Mich., 594; Barrie *v.* Grifford, 47 Ohio St., 181; Smith *v.* Huckabee, 53 Ala., 191; Terry *v.* Little, 101 U. S., 216; National Tube Works *v.* Ballon, 146 U. S., 517) * * * Such special remedies (*i. e.* to enforce stockholders' liability) can only be resorted to within the jurisdiction of that State, and can have no effect here."

In Marshall *v.* Sherman, 148 N. Y., 9, it was also held that a stockholder's liability under the laws of Kansas could not be primarily enforced in New York, because the statute prescribed a special and exclusive remedy, and hence that remedy must be pursued in the Courts of Kansas. The Court cited with approval Nimick *v.* Mingo Iron Works Co., 25 W. Va., 184, and Barnes *v.* Wheaton, 80 Hun (N. Y.), 8, both of which cases held that the liability under the laws of Ohio here in question must be enforced primarily in Ohio. The Court said:

> "Special remedies provided by foreign laws to enforce the liability of stockholders must be applied by the Courts of the State in the local jurisdiction, and where the corporation is domiciled" (*citing* Lowry *v.* Inman, 46 N. Y., 119; Christenson *v.* Eno, 106 N. Y., 97; Barnes *v.* Wheaton, 80 Hun (N. Y.), 8.) * * * But if, under any circumstances, the action could be maintained within this jurisdiction, it must be in such a form and by such modes of proceedure as like liabilities created under our own statutes are enforced against our own citizens."

In Cleveland, etc., R. Co. *v.* Kent, 87 Hun, 329, 34 N. Y. Supp. 427, it was held that the remedy under Rev. Stat., Ohio Sec., 3260, as it stood prior to the amendment of 1894, could be enforced only by the Courts of Ohio, and that the Courts of New York would not take jurisdiction.

The Court said:

> "The demurrer was sustained in the Court below upon the case of Barnes *v.* Wheaton, 80 Hun, 17, 29 N. Y. Supp., 830, which is authority for the proposition that an action to enforce the statutory liability of the stockholders of an insolvent Ohio corporation cannot be maintained in the Courts of this State, for the reason that the Ohio statute provided a special remedy, which is exclusive of all other remedies, and can only be administered in Ohio. We might well rest our decision, as did the Court below, upon that authority, because not only is it well reasoned, but it has support in principals. The rights of creditors of a corporation against the corporators rests upon the statute, and where an obligation or liability is imposed, and a remedy is given, these should be held to be inseparable, and creditors should be required to confine their remedy to the line prescribed by the statute. The distinction between statutes which, in addition to imposing liabilities, omit a remedy, and those which impose liability and fix the remedy, is lost sight of by the plaintiff, as will be seen by reference to the cases cited in support of the complaint, most, if not all, of which are instances where a statutory right was not coupled with a statutory remedy for its enforcement. Where, therefore, the remedy is of such a character that it can only have effectual operation in one forum, one interested should not be permitted to enforce it in any other place. Statutes relating to procedure have no extra-territorial effect. As will be seen from a reading of the Ohio statute quoted, there is a restriction in regard to costs, but such restriction could not be given effect in this State.

because such subject would be controlled by our laws, and yet that restriction is an integral part of the statutory remedy."

In Savings Association *v.* O'Brien, 51 Hun (N. Y.), 45, 3 N. Y. Supp., 764, it was held that the remedy under the Missouri statute by execution against stockholders

> "can only be enforced in the Courts of the State of Missouri, and in the mode and by the process therein prescribed." * * * "If the charter of the corporation, or the general laws of the State creating it, declare a personal liability against the shareholders equal to the amount of the capital stock, which may be enforced in the name and for the benefit of any creditor, and does not prescribe the mode and manner of enforcing such liabilities, then the liability follows the person of the stockholder, and may be enforced, as other personal obligations are enforced, according to the course of procedure existing in the place where the individual sought to be charged is found. But if the effect of the statutory provisions is not to charge the property of the stockholder generally, but only to an amount equal to the stock, upon prescribed conditions, and by a specific process, the remedy of the creditor must be sought according to the terms and by the means prescribed by the charter." *Citing,* Lowry *v.* Inman, 46 N. Y., 119.

In Morley *v.* Thayer, 3 Fed., 737, a bill in equity in Massachusetts brought to enforce the liability of stockholders under the laws of Missouri was dismissed for want of equity. Clifford, *C. J.,* said:

> "When a general liability is created by statute without a remedy being given, the right may be enforced by an appropriate action at law; but when the provision creating the liability is coupled with one for a special remedy, that remedy and that alone must be pursued."

In Russell *v.* Pacific R. Co., 113 Cal., 258; 34 L. R. A., 747, it was held that the courts of another State cannot enforce the stockholder's liability for unpaid subscriptions under the Illinois statute, because that statute provided a special exclusive remedy in the nature of garnishment. The Court said:

> "Counsel for appellants admit that the proceedings provided for in the 25th section can be taken only in the State of Illinois. It is special remedy, providing for contribution among the stockholders, and a possible dissolution of the corporation and a winding up of its business. They contend, however, that the 8th section merely creates a liability, which is in the nature of a contract liability, and which is enforceable wherever the stockholder can be found. The general rule upon this subject is very well established. Where a statute creates a right and prescribes a remedy for its enforcement, that remedy is exclusive. Where a liability is created which is not penal, and no remedy is prescribed, the liability may be enforced wherever the person is found. The procedure will, however, be entirely governed by the law of the forum. If the law creating the liability provides for a particular mode of enforcing it, the mode limits the liability. If it be a contract, the parties here contracted with the understanding that they can be held liable in no other way. Fourth Nat. Bank v. Francklyn, 120 U. S., 747; 30 L. ed., 825. And such a liability cannot be enforced in another State. Young *v.* Farwell, 139 Ill., 326; Bank of North America *v.* Rindge, 154 Mass., 203; 13 L. R. A., 56; Fowler *v.* Lamson, 146 Ill., 472; Jessup *v.* Carnegie, 80 N. Y., 441; 36 Am. Rep., 643; Erickson *v.* Nesmith, 4 Allen, 233."

In May *v.* Black, 77 Wis., 101, it was held that the liability of stockholders under a self-executing provision

in the constitution of Michigan could not be enforced in Wisconsin, because the statutes of Michigan had provided an exclusive remedy which could only be pursued in the courts of Michigan. The Court said:

> "It is a principle of law that does not appear to be questioned, that where a special remedy against stockholders is prescribed by the statute under which the corporation is found, it must be enforced in the courts of that State exclusively."

The Court cited with approval Nimick *v.* Mingo Iron Works Co., 25 W. Va., 184, which held that the remedy under the Ohio statute must be pursued in Ohio.

In Howarth *v.* Angle, 162 N. Y., 179, it was held that a receiver of a foreign corporation, who was also a *quasi* assignee, invested with all the rights possessed by its creditors, could maintain an action in the courts of New York to enforce against stockholders residing there a several liability for corporate debts imposed by the foreign statute, *after having had that liability determined in a proceeding taken in the foreign court.* The decision was expressly based upon the fact that the statute prescribed no remedy. The Court said:

> "If the statute upon which the personal liability of the stockholders is founded, had also provided a remedy for that liability, such remedy would have been exclusive and could not have been enforced in the courts of this State."

It was also held that the procedure must be according to the laws of New York. The Court cited with approval Marshall *v.* Sherman, *supra,* and distinguished it. The case of Stoddard *v.* Lum, 159 N. Y., 265, was precisely similar to the Howarth case, *supra.*

In Burr *v.* Smith, 113 Fed., 858, a receiver appointed by the Ohio Court of Common Pleas, under section 3260 as amended in 1900, was properly allowed to sue a stockholder in the Federal Court sitting in Indiana.

In Hale *v.* Calder, 113 Fed., 670, and Hale *v.* Hardon, 95 Fed., 747, a receiver appointed under the Minnesota statute was allowed to sue a stockholder in Rhode Island and Massachusetts respectively.

These cases indicate the only mode of enforcing the liability against non-resident stockholders who cannot be reached in Ohio.

There are two classes of statutes imposing upon stockholders liability beyond their subscriptions for stock for the debts of the corporation. One class imposes a primary and direct liabiiity, such as partners are subject to towards the creditors of the firm, though limited in amount. The liability under this class of statutes may be enforced against a stockholder anywhere according to the laws of the forum.

Whitman *v.* Bank, 176 U. S., 559;
Miller *v.* Smith, — R. I., —; 58 Atl., 634;
Zang *v.* Wyant, 25 Colo., 551; 71 Am. St. R., 145;
Rhodes *v.* U. S. National Bank, 24 U. S. App., 607; 34 L. R. A., 742;
Flash *v.* Conn, 109 U. S., 371;
Savings Association *v.* O'Brien, 51 Hun (N. Y.), 45; 3 N. Y. Supp., 764.

The second class of statutes, to which the Ohio statutes belong, provide only for contribution to a fund to be distributed by a court of equity among creditors generally. Under this class of statutes, the action must first be brought in the State where the corporation is located. Afterwards, non-resident stockholders may be

sued in other jurisdictions to enforce the liability as ascertained in the original statutory proceeding.

Evans *v.* Nellis, 187 U. S., 271;
Miller *v.* Smith, — R. I., —; 58 Atl., 634;
Tuttle *v.* National Bank, 161 Ill., 497;
Marshall *v.* Sherman, 148 N. Y., 9;
Barnes *v.* Wheaton, 80 Hun, 8; 29 N. Y. Supp., 830 (decided under Ohio statute);
Cleveland, etc., R. Co. *v.* Kent, 87 Hun, 329; 34 N. Y. Supp., 427 (decided under Ohio statute);
Nimick *v.* Mingo Iron Works Co., 25 W. Va., 184 (decided under Ohio statute);
Erickson *v.* Nesmith, 4 Allen (Mass.), 233;
Hale *v.* Hardon, 95 Fed., 747;
State Bank *v.* Sayward, 86 Fed., 45; affirmed 91 Fed., 443; 33 C. C. A., 564 (decided under Ohio statute);
Hale *v.* Allison, 188 U. S., 56.

Three cases decided by this court are practically decisive of the questions certified.

Whitman *v.* Oxford Nat. Bank, 176 U. S., 559;
Evans *v.* Nellis, 187 U. S., 271;
Hale *v.* Allison, 188 U. S., 56.

The first of the above cases arose under the Kansas statute as it existed prior to the act of 1899. It was held that the Kansas constitution was self-executing, and imposed a several, contractual liability. The Kansas statute authorized this liability to be enforced by an ordinary action at law by any individual creditor against any individual stockholder, and did not provide an exclusive statutory remedy. It was accordingly held that this liability might be enforced in any court of competent jurisdiction, either State or Federal.

Whitman *v.* Oxford Nat. Bank., 176 U. S., 559.

The second of the above cases also arose under the laws of Kansas, but in the meanwhile the statute had been changed by the act of 1899. This act repealed the statute authorizing a several action at law, and provided a remedy in equity against all stockholders for the benefit of all creditors substantially the same as that under the Ohio statute. This court held that the remedy under the act of 1899 was exclusive, and that therefore a receiver who had not brought an action against the corporation could not maintain an action in the Circuit Court for the Northern District of New York against an individual stockholder for the amount of his statutory liability. The Court quoted with approval from the Supreme Court of Kansas (Waller *v.* Hamer [Kan.], 69 Pac., 185), as follows:

> "There exists no other statute by which the creditor of an insolvent or dissolved corporation may proceed against its stockholders. It follows, therefore, that if a creditor desires to make a stockholder respond for the debts of the corporation, he must proceed against him in the mode prescribed and no other."

Testing by this rule the right of the receiver to sue, this Court said:

> "As he had not brought suit against the corporation, and all the resident stockholders, in order in such suit to fix the sum required to pay the corporate debts, he was wholly without authority, under the statute, to make any demand whatever against a stockholder, *as the previous suit to fix the sum required to pay the debts was an essential prerequisite*, under the statute, *to any action against a stockholder.*"

This Court quoted further from the Supreme Court of Kansas, as follows:

> "The act provides a complete system for collecting the assets and paying the debts of an insolvent corporation, and of adjusting the liabilities of the stockholders between themselves. To do this the receiver must bring in all stockholders that are within the jurisdiction of the court, that in one proceeding the Court may ascertain and determine the indebtedness of the corporation, the amount each stockholder should pay, and if one has paid more than his proportion, award him such relief against the other stockholders as may be just."

The receiver having failed to comply with this plain statutory requirement, a plea in abatement was sustained.

Evans *v.* Nellis, 187 U. S., 271.

In these two cases, the constitutional provision was the same, but the statute governing the remedy was changed. One suit was maintained. The other failed. In other words, the constitution of Kansas does not create a liability enforceable in another State without compliance with the Kansas statute regulating the remedy.

This answers the questions certified.

The third case above cited arose under the Minnesota statute. The statutory suit had been brought in the Minnesota State Court, and a receiver had been appointed. It was held that such receiver could not maintain a bill in equity in the Federal Court sitting in Pennsylvania against stockholders residing there. The doctrine of this decision is that the statutory proceeding in the home state is a condition precedent to the enforcement of any liabil-

ity against a stockholder, and that then the liability of non-resident stockholders is *several and at law.*

Hale *v.* Allison, 188 U. S., 56.

In Hale *v.* Hardon, 95 Fed., 747, it was held by the Circuit Court of Appeals that a receiver appointed in the statutory proceeding brought in Minnesota under the Minnesota statute could sue at law a stockholder in the State of Massachusetts. The Ohio statute as amended in 1900 is a substantial copy of the Minnesota statute. This decision is therefore directly in point. The Court said:

> "The ascertainments of the debts and assets of the corporation, and the judgments against the resident stockholders, in the parent forum, are in no sense personal judgments against the non-resident stockholders, *but are necessary preliminaries to a recovery in an extra-territorial proceeding against non-resident stockholders.* To enforce extra-territorially the individual stockholder liability created by statute, and to entitle the creditors or the parties representing them to judgment, it is incumbent upon plaintiffs to show that the ascertainments intended by the statute have been made" * * * "As a part of the implied contract the stockholders agreed that the ascertainments which the statute intended, and which the situation resulting from the insolvency required, should be made in accordance with the usual and ordinary course of legal and equitable procedure in that State * * * So in an ancillary proceeding like this, to enforce individual liability to creditors, it must be made to appear by the records in respect to the parent proceeding, or otherwise, that the proper statutory ascertainments have been made as to domiciliary matters; and since the question of fact, whether the non-resident party was a stockholder, and as such liable individually under the statute, could not be concluded in a proceeding in which he

was not a party except as a member, or as an integral part of a corporation, it is an open question to be determined by the proper tribunal in a case in which he is a party—it being open, of course, to the defendant stockholders to point out that the domiciliary adjudications and ascertainments were not sufficiently comprehensive to answer the requirements of the statute, and to show that he was not a stockholder, or that the proceedings were fraudulent" * * * "*The statute of Minnesota intends a comprehensive proceeding in the corporate domicile. It cannot be had elsewhere.*"

In Miller *v.* Smith, — R. I., — 58 Atl., 634, the Court, construing the Colorado statute, which is substantially the same as the Ohio statute, said:

"There can be no doubt * * * that the liability imposed on a stockholder by this statute * * * is to contribute proportionally with other stockholders to a fund sufficient to pay the debts of the corporation, and that this liability must be ascertained in a forum where the amount of debts can be ascertained and the proportionate liability to contribute can be adjusted among the stockholders. * * * Such an action must, in ordinary cases, be brought in the State where the corporation is located. There only can its obligations be ascertained, its officers be controlled, and its assets marshalled. There will usually be found most of its stockholders, and only there can their mutual rights and obligations be adjusted. * * * Whatever proceedings may be proper to enforce their proportionate liability upon stockholders in other states, such proceedings cannot be equitably taken until such liability has been ascertained in the State of the domicile of the corporation. * * * Courts which carry the practice of interstate comity to the farthest limit agree that where the obligation of the stockholder is secondary to that of the corporation,

and proportionate to that of other stockholders, it will not be enforced in other jurisdictions unless the equities between all stockholders and all creditors can be administered."

The bill was dismissed *on demurrer upon the* ground that proceedings must first be had under the statute to establish the pro rata liability.

In Howarth *v.* Lombard, 175 Mass., 570, 575, 56 N. E., 888, 49 L. R. A., 301, decided in 1900, the Court say of the obligation of a stockholder imposed by the law of a foreign State:

"Such a right ought to be enforceable. Inasmuch as the nature of it and the method of enforcing it depends upon the statute which enters into the implied contract, we must look to the statute to ascertain its extent and the manner of enforcing it. If it is of such a nature as to call for local proceedings in the State where the corporation is in order to adjust equities, such proceedings must be had, and it cannot be made effectual without them. Most of the cases in which creditors of foreign corporations have been refused relief in this commonwealth have shown rights which, under the statutes creating them, could not properly be enforced without proceedings in the foreign State whereby equities could be adjusted. In the present case, as the statute has been construed, it is plain that no action can be maintained against a stockholder until after proceedings in a Court of Washington showing the insolvency of the corporation and the need of payment to satisfy the claims of creditors. After such proceedings and an adjustment of the rights and liabilities of the corporation, of creditors, and of stockholders, collection can be made for stockholders wherever they are found."

In Tuttle *v.* National Bank, 161 Ill., 497; 34 L. R. A., 750, 755, the Court said:

"The important question to be here determined is, whether the courts of this State will, in any form, take jurisdiction of a question arising as to the respective relations of creditors and stockholders of a corporation of another State, where a special remedy is provided by statute, before there is a determination by the courts of such State of the just proportion of the corporate indebtedness to be borne by solvent stockholders of such corporation. No decree of the courts of this State could result in taking an account and dissolving a corporation of another State. It is for the courts of that State to enter a decree stating the account, winding up the affairs of the corporation, and determining the relation of the stockholders, creditors and corporation to each other. When that question has been determined by the courts of that State, then, if it becomes necessary, the creditors, stockholders and the corporation, or its representative, may, as against stockholders who are domiciled here, appeal to the courts of this State, and have, as against such domiciled stockholders, adequate relief. * * * It only, then, becomes necessary to determine whether such determination has been had by the courts of Kansas."

In Barnes *v.* Wheaton, 80 Hun (N. Y.), 8; 29 N. Y. Supp., 830, it was held that the Ohio constitution is not self-executing so as to create a right of action in another State against a stockholder of an Ohio corporation, and that the remedy provided by Rev. Stat. Ohio, Sec. 3260, as it stood prior to the amendment of 1894, could be enforced only in the courts of Ohio, and not in the courts of New York. This case is precisely similar in all respects to the case at bar. It was an attempt to enforce the Ohio remedy in the courts of New York.

In Cleveland Co. *v.* Kent, 87 Hun, 329; 34 N. Y. Supp., 427, it was held that an action in equity to enforce the

liability under the Ohio statute of stockholders of an insolvent Ohio corporation is not maintainable in the courts of New York. The Court said:

> "If this were an action at law to enforce a statutory liability for a right given by an Ohio statute to an individual creditor against an individual stockholder, then this court would have and could assume jurisdiction. Where, however, an action in equity is necessary, and where, as here, what is sought is an accounting between creditors and stockholders to enforce a remedy given by the Ohio statute, in which suit it is necessary to have a marshaling of assets, and an accounting between creditors and stockholders, and a determination of the amount of liability, respectively, of each individual stockholder, such a suit, in the absence of all those interested in the accounting, notably creditors, over whom it is not shown that the court can acquire jurisdiction, should not be maintained in this State." * * *
> "The courts of this State are not, therefore, in a position to take and state an account of all the company's indebtedness, determine the liability of the several stockholders, and compel the payment of each one's quota into a common fund, and the distribution of it among all the creditors in proportion to their debts, so as to do justice, and settle once for all, in the manner contemplated by the Ohio statute, the whole liability of all the stockholders. Thus in this case, if our courts were to assume jurisdiction, let us suppose that some of the creditors, residents of Ohio, because known, or through inadvertence, should be omitted as parties, clearly they would not be bound by any judgment rendered in this action. If to settle the liabilities of the company, stockholders were held only to the extent of 50 per cent. of their liability, would not the creditors in Ohio who were not parties have a right to proceed for the purpose of obtaining the other 50 per cent. still due from the

> stockholders? Or, to take another illustration, if by the judgment in this court, to satisfy the claims of creditors who appeared, the entire amount of the liability of each stockholder was required to be paid, what, in such a case, would be the situation of creditors in Ohio who were not parties and had no notice of the suit pending here, and who were not, therefore, bound by the judgment? Would it be claimed, notwithstanding the payment of the full amount for which the stockholders were liable under the Ohio statute, that they were still answerable to the creditors there who were not bound by the judgment? Or, on the other hand, would it be contended that such creditors, who were without notice of this suit, and were not made parties, and who therefore were not bound by the judgment, are remediless, and not entitled to share in the distribution of the assets of the corporation?"

In Nimick *v.* Mingo Iron Works Co., 25 W. Va., 184, it was held that Ohio Rev. Stat., Sec. 3260, provides the exclusive remedy to enforce the liability of stockholders existing under the laws of Ohio; that such remedy must be pursued in the Courts of Ohio where the corporation is located; and that a bill in equity to determine the extent of this individual liability against the stockholders cannot be sustained in the Courts of West Virginia. This case was precisely similar to the case at bar. We commend it to the consideration of the Court. The able and exhaustive opinion constitutes a unanswerable argument against the maintenance of a suit under the Ohio statute in any but an Ohio Court.

The case of State Bank of Cleveland *v.* Sayward (C. C.), 86 Fed., 45, affirmed 91 Fed., 443, 33 C. C. A., 564, was begun in the United States Circuit Court for the District of Massachusetts by a creditor of an Ohio corporation

agaist stockholders residents of Massachusetts. It was dismissed by Judge Colt, who held that

> "a bill in equity cannot be maintained by a creditor to enforce the liability of a stockholder in a corporation organized under the laws of another State," quoting, from Post *v.* Railroad Co., 144 Mass., 345, 11 N. E., 540, 59 Am. Rep., 86, the words of Chief Justice Field: "This Court does not take jurisdiction of a suit to enforce this liability of stockholders in a foreign corporation, not because it would be a suit to enforce a penalty, or a suit opposed to the policy of our laws, but because it is a suit against a foreign corporation, which involves the relation between it and its stockholders, and in which complete justice only can be done by the Courts of the jurisdiction where the corporation was created. * * * If an assessment is to be laid upon the members or stockholders, or a contribution enforced from them, according to the law of the State under which the corporation is created, the Courts of that State alone can afford complete and effectual judicial relief." The case came up in the Circuit Court of Appeals (State Nat. Bank *v.* Sayward, 91 Fed., 443, 33 C. C. A., 564), and was decided January 29, 1899. After citing the decisions of the Court of Ohio holding that the obligation under the statute was contributive, and required an equitable action to enforce it, the Court very clearly demonstrated the impossibility of doing justice to the parties in a Court which has not jurisdiction of the corporation and only of a portion of the stockholders and creditors.

Kirtley *v.* Holmes, 107 Fed. 1, 46 C. C. A., 102, 52 L. R. A., 738, was a case decided in the United States Circuit Court of Appeals for the Sixth Circuit, brought to enforce the liability of a resident of Kentucky who was a stockholder in an Ohio corporation. In that case suit had been brought in Ohio, and the amount assessable upon each

stockholder had been determined. The Court say (page 6, 107 Fed., page 108, 46 C. C. A., 52 L. R. A., 738):

> "Is the remedy afforded by the Courts of Ohio of such a peculiarly local nature that it would be inequitable to undertake to enforce it in another jurisdiction? Will such enforcement work a hardship and inflict an additional burden upon foreign stockholders? It may be admitted that, if such will be the effect of undertaking to enforce the liability, a court of another jurisdiction will withhold relief. Bank *v.* Francklyn, 120 U. S., 747, 7 Sup. Ct., 757, 30 L. Ed., 825. In that case, Mr. Justice Gray, delivering the opinion of the Court, said: 'In all the diversity of opinion in the Courts of the different States upon the question how far a liability imposed upon stockholders in a corporation by the law of the State which creates it can be pursued in a Court held beyond the limits of that State, no case has been found in which such a liability has been enforced by any Court without compliance with the conditions applicable to it under the legislative acts and judicial decisions of the State which creates the corporation and imposes the liability. To hold that it could be enforced without such compliance would be to subject stockholders residing out of the State to a greater burden than domestic stockholders.' "

It appears from the foregoing review of the authorities that the extra-territorial enforcement of the stockholders' liability under the Ohio laws has been sought in six cases. In four of these cases the suits failed because the Ohio statute had not been followed, and there had been no original proceeding in Ohio.

State National Bank *v.* Sayward, 86 Fed., 45; affirmed 91 Fed., 443;

Nimick *v.* Mingo Iron Works Co., 25 W. Va., 184;

Barnes *v.* Wheaton, 80 Hun (N. Y.), 17;
Cleveland *v.* Kent, 87 Hun (N. Y.), 329.

These cases have been approved by the New York Court of Appeals in Marshall *v.* Sherman, 148 N. Y., 9, and Howarth *v.* Angle, 162 N. Y., 179.

In two cases the liability under the Ohio laws was enforced extra-territorily, but in each case the Ohio statute had been followed. An original statutory proceeding had been had in the courts of Ohio, and the foreign suits were brought by a receiver appointed in the original proceeding.

Kirtly *v.* Holmes, 107 Fed., 1;
Burr *v.* Smith, 113 Fed., 858.

It is submitted that these decisions show conclusively that the liability under the Ohio statute cannot be enforced extra-territorily without first complying with the provisions of the Ohio statute governing the remedy.

Both questions certified must be answered in the negative.

Respectfully submitted,

JUDSON & HALE,
Solicitors for Defendant David B. Ivison.

CHARLES N. JUDSON,
WILLIAM B. HALE,
of Counsel.